Supreme Court, U.S.
FILED

961286 FEB 12 1997

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DR. JOHN HAGELIN, DR. MIKE TOMPKINS,
and the NATURAL LAW PARTY OF THE UNITED STATES OF AMERICA,
Petitioners,

vs.

FEDERAL ELECTION COMMISSION and
COMMISSION ON PRESIDENTIAL DEBATES,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

This case concerns the scope of federal court subject matter jurisdiction under the special jurisdictional provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 437g(a)(8). Petitioners brought a statutory civil action against the Federal Election Commission ("FEC") and the Commission on Presidential Debates ("CPD") seeking an order enjoining the CPD's blatant violation of the FECA in holding partisan debates which violated express requirements necessary to exempt debate sponsorship from the federal election law contribution limits and prohibitions. In particular, the CPD allegedly violated the requirements that a debate sponsor must be *nonpartisan* and must use "objective" "pre-established" candidate selection guidelines. 11 C.F.R. §110.13.

The district court dismissed the case on summary judgment finding that there was no subject matter jurisdiction.[1] The court held that Petitioners were jurisdictionally required to fully exhaust the administrative process before the FEC, even though that process was admittedly incapable of granting a remedy before the irreparable injury from the violation occurred. The Court of Appeals for the District of Columbia Circuit, *Per Curiam*, affirmed.

The question presented is:

Is an aggrieved party required to exhaust his or her administrative remedies under the statutory scheme of the Federal Election Campaign Act even where such exhaustion is futile and will necessarily result in an irreparable loss of the aggrieved party's rights?

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[1] Petitioners' action was consolidated at the trial court level with a similar action brought by H. Ross Perot, Pat Choate and Perot '96, Inc. (the "Perot appellants"). Likewise, the court of appeals consolidated the actions in reviewing the district court's order. Besides similar claims to Petitioners, Perot raised Constitutional claims which are not involved here. The Perot appellants have not sought a writ of certiorari.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court except for Mr. H. Ross Perot, Mr. Pat Choate and Perot '96, Inc., who filed an action under a different docket number which was consolidated for hearing purposes with the action filed by petitioners. Petitioner The Natural Law Party of the United States of America has no parent corporation or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Dr. John Hagelin, Dr. Mike Tompkins and the Natural Law Party of the United States of America respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is printed at 97 F.3d 553 (D.C.Cir. 1996). It is reprinted in the Appendix ("App.") at A-1 to A-15. The district court's unpublished opinion and order is reprinted at App. A-16 to A-33. The court of appeals order denying Petitioners' petition for rehearing *en banc* is not reported and is reprinted at App. A-34.

JURISDICTION

The court of appeals entered its judgment on October 4, 1996. It denied a timely petition for rehearing on October 15, 1996. This Court granted Petitioners' timely filed request for an extension of time in which to file its Petition for Certiorari and granted Petitioners until February 12, 1997 to file their Petition. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is 2 U.S.C. §431, et seq., and regulations thereunder. The specific jurisdictional section is §437g(a)(8).[2]

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[2] Section 437g(a)(8) states:

> (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(Footnote 2 continued on next page)

Other sections of significance are 2 U.S.C. §§ 441a-b; §431(9)(B)(ii); and 11 CFR §110.13.

An overview of the statutory scheme is necessary for an understanding of Petitioners' action and Petition for Certiorari. Petitioners sought a preliminary injunction to prohibit the CPD's violation of the FECA and 11 CFR §110.13 by its establishment and application of, subjective debate selection criteria that unlawfully excluded Petitioner Dr. Hagelin from the debates.

The underlying intent of Congress in adopting the FECA was to "promote fair practices in the conduct of elections" as well as to "give candidates greater access to the media." 1972 U.S. Cong. Rec. 1773-4 (P.L. 92-225). Section 441b of the FECA expressly prohibits "any corporation" from making *any* contribution or expenditure "in connection with any election" for President or other specified offices, while §441a strictly limits the amount of individual contributions by "any person" to such candidates. The holding of a debate involves the expenditure of an enormous amount of funds and "in kind" contributions to the participating candidates, and by definition is therefore prohibited by the FECA unless the "contribution" falls within a lawful exception. The ability of debates to attract millions of dollars in free network media coverage further establishes the critical importance of the contribution to the candidates invited to the debates.

(Footnote 2 continued)

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint

The FECA, however, permits debates and other party-neutral activities to be sponsored for candidates, notwithstanding the expenditure prohibitions in the FECA, provided such sponsors are purely "nonpartisan" and the event is designed "to encourage individuals to vote or to register to vote." 2 U.S.C. §431(9)(B)(ii). Because a debate would otherwise violate the corporate contribution and individual dollar limit prohibitions of the FECA, a failure of a staging organization to comply with the narrow exception for debates is, by definition, a violation of the general contribution prohibitions in the FECA. *See* 44 FR 76734 (December 27, 1979) (Debate rule creates "narrow exemption" from prohibitions in FECA).

To delineate this narrow exception to the FECA, the FEC amended 11 C.F.R. §110.13 (effective March 13, 1996), which permits debate sponsorship only by certain specified nonpartisan organizations and only if "objective" "pre-established" candidate selection guidelines are used.[3] Individuals, unincorporated entities, and corporations not falling within the "nonpartisan" requirement of the FECA are simply not allowed to contribute the value of staging such a debate or other event under

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[3] 11 C.F.R. §110.13 states:

(a) *Staging Organizations.* (1) Nonprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 CFR 114.4(f). (2) Broadcasters, *bona fide* newspapers, magazines and other periodical publications may stage candidate debates in accordance with this section and 11 CFR 114.4(f).

(b) *Debate structure.* The structure of debates staged in accordance with this section and 11 CFR 114.4(f) is left to the discretion of the staging organization(s), provided that: (1) Such debates include at least two candidates; and (2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(Footnote 3 continued on next page)

the narrow exception in the FECA. *See* 60 FR 64261 (Dec. 14, 1995). Clearly, the "nonpartisan" and "pre-established objective criteria" requirements of the FECA and the Regulation were designed to prevent illegal contributions to one or more candidates flowing through a biased source masquerading as a neutral staging organization. It is clear that if a partisan organization could funnel millions of dollars of contributions in media attention and other "in kind" value to favored candidates or favored parties through debates or other events biased toward such candidates or parties, the entire protections of the FECA would be thwarted. For this reason, the regulation also expressly prohibits using membership in a major party as the sole objective criteria. 11 CFR §110.13. In addition, both the FECA and the Regulation prohibit debate criteria that "allows a staging organization to bar minor party candidates" or that are "designed to result in the selection of certain pre-chosen participants." 60 FR 64261 (Dec. 14, 1995).

Relying on their private right of action created by §437g(a)(8)(C),[4] the Petitioners sought declaratory and injunctive relief due to the CPD's blatant violation of these statutory provisions by sponsoring Presidential debates as a "bipartisan" organization with admittedly "subjective" criteria that were

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(Footnote 3 continued)

> (c) *Criteria for candidate selection.* For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in the debate. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates.

[4] This section gives an aggrieved party a right to bring a "civil action to remedy the violation involved in the original complaint."

successfully used to bar all third-party national Presidential candidates.

STATEMENT OF THE CASE

Petitioners Dr. John Hagelin and Dr. Mike Tompkins were the 1996 Presidential and Vice Presidential candidates of Petitioner the Natural Law Party ("NLP"). In 1992, the NLP was officially confirmed by the FEC as a "national political party" and subsequently became the first such third party in United States history to also have its presidential candidate receive federal matching funds. The NLP is the largest and fastest growing third party in the country, and in 1996 gathered over *one million signatures* simply to gain access to state ballots. The party had to comply with the welter of restrictive state ballot-access requirements, sometimes having to resort to lawsuits to force state officials to comply with the law. In 1996, the NLP ran hundreds of candidates for federal, state and local offices, and Dr. Hagelin, its presidential candidate, was on the ballot in 42 states and the District of Columbia, accounting for 459 electors in the electoral college.

Petitioners, like all third-party national presidential candidates, were dependent upon the CPD as the presidential debate staging organization to act lawfully in organizing the debates and objectively selecting its participants. The CPD, however, was formed as an expressly "bipartisan" venture of the Democratic and Republican Parties to control the staging of Presidential debates. The CPD was designed to replace the League of Women Voters as the debate sponsor, with the express goal of staging debates "between the presidential and vice-presidential nominees of the *two major political parties*." Memorandum of Agreement between the Democratic National Committee and the Republican National Committee Tab 1 at Exhibit 10, Reply Brief of Petitioners, District Court Case No. 1:967CV2132 (hereinafter "Reply Brief"). In February, 1987, the two major parties issued a joint press release announcing the creation of the

CPD as a "*bipartisan*" commission to sponsor "debates *between the nominees of the two political parties.*" (Reply Brief Tab 1 at Exhibit 11). (emphasis added). The *non*-partisan League of Women Voters immediately condemned the "bipartisan" approach in a press release declaring that control of debates by the two major candidates "would perpetuate a fraud on the American voter." Undaunted, the CPD quickly stepped in to assume sponsorship of the debates.

In defiance of the FECA and the FEC's newly adopted regulation (11 CFR § 110.13(c)) requiring "objective" selection criteria, the partisan CPD chose to rely on largely subjective selection criteria that it had previously published. (CPD Memorandum in Support of Motion to Dismiss at Tab I, 1, district court case no. 1:967CV2132) ("CPD Brief"). In these selection criteria, the CPD gives an automatic invitation to the nominees of the Republican and Democratic parties, even though the governing FEC regulation expressly proscribes such a singular criterion. Specifically, the CPD's selection criteria provide that:

> A Democratic or Republican nominee has been elected to the Presidency for more than a century. Such historical prominence and sustained voter interest warrants the extension of an invitation to the respective nominees of the two major parties to participate in the Commission's 1996 debates.

Selection criteria that are designed to ensure invitations to the two major parties under *any* circumstances is not "nonpartisan" but "bipartisan," and are in fact designed to result in the inclusion of two "pre-chosen" participants - the Democrats and the Republicans.

For third-party candidates, however, the CPD's published rules used subjective criteria including the "professional opinions of Washington bureau chiefs of major newspapers, news magazines, and broadcast networks" and the "opinions" of "a

comparable group of professional campaign managers and pollsters." CPD Brief Tab I, 1. These subjective criteria were used by the CPD to then determine whether a candidate had a "realistic chance of winning the election."

On September 5, 1996, shortly after Dr. Hagelin and Dr. Tompkins were nominated at the NLP's national convention, the NLP filed a complaint with the FEC challenging the use by the Commission on Presidential Debates ("CPD") of impermissible subjective standards for selection of candidates to participate in the televised presidential debates.

Notwithstanding the plain violation of the governing regulation, the FEC advised the NLP that it would be unable to make a determination in response to the NLP complaint prior to the staging of the first debate.[5] Moreover, the procedural rules governing the FEC made it impossible for that agency to act on the NLP complaint prior to the general election. Under these exigent circumstances, the administrative review procedures of the FEC were a useless and a meaningless formality that provided Petitioners with no adequate remedy. Furthermore, the FEC was powerless to enjoin the clearly illegal acts of the CPD and thereby avert the irreparable harm to the Petitioners and the electoral process that would result from exclusion from the nationally televised debates. Thus, the gravamen of the relief Petitioners sought was to assert their statutory right to enforce the FECA by seeking direct action from the district court to enjoin the CPD from violating the FECA and regulations thereunder in its sponsorship of the debates.

Petitioners were not asking the district court to include Dr. Hagelin in the debates. Nor were Petitioners seeking to enjoin the established political parties from staging their own private

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[5] The FEC paralysis continues. As of this date the FEC still has not acted upon the Complaint.

debates. The relief sought was simple: if a staging organization is to sponsor debates, it must do so in compliance with the FECA.

Not surprisingly, the CPD proceeded to rely on its unlawful subjective criteria to exclude *all* third-party candidates from the presidential debates, including Petitioners.

PROCEEDINGS AND DISPOSITION BELOW

The district court, ruling from the bench, after hearing oral argument, denied the Petitioners' (and Perot Appellants') request for preliminary injunctive relief and held that exclusive initial jurisdiction to adjudicate civil claims was granted to the FEC under the FECA and therefore, the district court could not exercise jurisdiction over the claims. The court noted that the issue presented was "unique" and perhaps had not been decided in any circuit previously. App. A-21.

On emergency appeal, the court of appeals affirmed the district court holding that the administrative process in §437g must be followed before the court may hear the "civil action" provided by §437g (a)(8). The court rejected Petitioners' argument that the statutory administrative process could be dispensed with in certain circumstances such as where the process was incapable of remedying the violation before irreparable injuries resulted. The Court found that to do so would be at odds with a recent Supreme Court decision, citing *McCarty v. Madigan*, 503 U.S. 140, 144 (1992). App. A-10.

REASON FOR GRANTING THE WRIT

The appellate decision held that the FECA's statutory exhaustion requirement erected an absolute, unwaivable prohibition on judicial review. Ignoring established exceptions to statutory exhaustion requirements (*see, infra*) such as those contained in the FECA, the court of appeals simply proclaimed that "Congress could have chosen to allow judicial intervention in the face of such exigencies, but it did not do so." App. A-10. Although noting that even its own prior decision in *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 543 (D.C.Cir. 1980) had acknowledged that there might be extraordinary circumstances that may necessitate waiver of the FECA exhaustion requirement, the appellate panel observed that this opinion was prior to this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), which *in dicta* repeated the oft-cited general rule that if "Congress specifically mandates, exhaustion is required." App. A-10. Not only did this Court in *Madigan not* hold that there was *no* exception to this general rule, the panel ignored the established exceptions to statutorily-mandated exhaustion previously recognized by this Court and the various circuits. Particularly here, where the violation of federal law corrupts a democratic process because of the undisputed importance of the presidential debates in presidential elections, no more compelling reason can exist for application of one of these established exceptions to statutorily-mandated exhaustion.

I. The Court of Appeals Disregarded Precedent and Incorrectly Extended This Court's Decision in *McCarthy v. Madigan*

Petitioners acknowledge that the administrative complaint procedure under §437 of the FECA, because it is statutorily mandated, is jurisdictional. However, this Court has explained that "jurisdiction" pursuant to a statutory exhaustion requirement "is not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as

1331 and 1332." *Weinberger v. Salfi,* 422 U.S. 749, 766 (1975) and *see Rafeedie v. I.N.S.,* 880 F.2d 506, 527 (D.C. Cir. 1989) (J. Ginsburg, concurring). Thus, there are recognized limited exceptions to such jurisdictional exhaustion requirements.

The decision of the court of appeals denying the existence of any exceptions to statutory exhaustion contradicts abundant prior precedent. Exceptions to the exhaustion requirement exist even where, as here, exhaustion of the administrative procedure can be deemed to be statutory and "jurisdictional." *Information Resources v. United States,* 950 F.2d 1122 (5th Cir. 1992)("exception to a statutorily mandated" procedure exists when the "administrative remedies are inadequate" even though "failure to exhaust deprives courts of jurisdiction"); *Venen v. United States,* 38 F.3d 100, 104 (3d Cir. 1994)(applying exception test to a statutorily mandated administrative procedure while acknowledging that ordinarily "failure to exhaust deprives the court of jurisdiction"); *Kerr Center Parents Assoc. v. Charles,* 897 F.2d 1463, 1469 (as applied to statutorily mandated administrative remedy, "[e]xhaustion is not required where it would be futile or where the administrative remedies available would be inadequate."); *Board of Trustees of the Construction Laborers' Pension Trust v. M.M. Sundt Construction Co.,* 37 F.3d 419 (9th Cir. 1994)(Ninth Circuit recognizing the exceptions to a *statutory* exhaustion requirement when the administration process "would be futile or would cause the plaintiff irreparable injury"); *Beverly v. Lone Store Lead Constr. Corp.,* 437 F.2d 1136 (5th Cir. 1971)(Title VII requires mandatory conciliation and negotiation procedures before filing a civil petition and imposes a mandatory exhaustion requirement; exhaustion a "prerequisite to suit" *unless* "a reasonable excuse for failure to do so is shown."). Indeed, the Court of Appeals below even rejected the analysis of now Justice Ginsburg's concurrence in *Rafeedie v. I.N.S.,* 880 F.2d 506, 526 (D.C.Cir. 1989), where Justice Ginsburg explained that even a statutory exhaustion requirement creates a condition that may be excused "when insistence on exhaustion

would threaten grave harm to the party seeking review and would not sensibly serve the purposes Congress envisioned in establishing that condition." The decision below thus represents an extreme interpretation of statutory exhaustion that is in clear conflict with other courts of appeals and the reasoned analysis of Justice Ginsburg in *Rafeedie*. See Chart of Appendix D comparing statutorily mandated exhaustion provisions with precedent acknowledging limited exceptions thereto.

Exceptions must exist for a meaningful remedy to be assured. This is particularly true here where the statutory scheme preempts all other state law causes of action of a candidate or other aggrieved party regarding federal elections. *See* U.S.C. 453 (preemption ; *cf. Friends of Phil Gramm v. Americans For Phil Gramm,* 587 F.Supp. 769 (E.D.Va. 1984) (FECA's preemption likely deprives candidate of common-law fraud protection and substitutes the FECA as "the exclusive remedy" for regarding misleading campaign literature). It simply was not Congress' intent to preempt a field in order to provide a federal cause of action, and then after terminating the previous legal protections, permit that new right of action to be wholly unenforceable at the critical moment. Neither Congress nor the Constitution can be deemed to have contemplated requiring civil litigants to exhaust a procedure that wholly denies them an adequate remedy. For example, in *Walker v. Southern Railway Co.*, 385 U.S. 196, 198 (1966), the Supreme Court rejected application of the jurisdictional exhaustion requirement mandated by the Railway Labor Act to a worker's private right of action against his employer where the administrative procedure was found to deny timely judicial review. While not explicitly articulating that statutory exhaustion may be excused under certain rare and limited circumstances, the outcome of *Walker* required the Court to waive a statutorily mandated exhaustion requirement. This, of course, is exactly the issue here, where the injury of the violation would irreparably occur *before* the FEC administrative procedure could possibly be exhausted.

The established authority for *exceptions* to mandatory exhaustion cited above have been expressly applied or cited in connection with the exhaustion requirements in Section 437 of FECA. For example, in *N.C.P.A.C. v. FEC*, 626 F.2d at 957, the circuit court denied relief not because exhaustion was in all cases required, but because the plaintiff there had not demonstrated that the case fit into one of the exceptions to the exhaustion requirement that existed for direct judicial action under the FECA.

In *In Re Carter-Mondale Reelection Committee, Inc..*, 642 F.2d 538, 541 (D.C. Cir. 1980), the circuit court declined to hear a direct civil action to remedy a FECA violation noting that "any petitioner seeking to hurdle the explicit time restraints of the [FECA] must demonstrate far more than does Carter-Mondale in this proceeding." *Id.* at 543. Thus, again the question in that case was whether an exception to FECA exhaustion was met, not whether such exceptions exist.

Unlike the facts in *Carter-Mondale*, it is hard to imagine more exigent and extraordinary circumstances than a violation by a corporation which effects all third-party candidates and which the violating party *knows* cannot be remedied until after the election, when it is too late to ever cure the process or the victim(s) from the harm of the violations.

The court of appeals, however, noted that the statement in *Carter-Mondale* was made prior to this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). App. A-10. Thus, the panel apparently believed this Court's decision in *Madigan sub silentio* overturned the abundant precedent acknowledging narrow exceptions even to statutory exhaustion requirements.

Madigan involved a prisoner who, because he was seeking money damages which the Federal Bureau of Prisons could not provide, sought to by-pass the specific grievance procedures set forth in the regulations promulgated by the Bureau ("Adminis-

trative Procedure For Inmates" 26 CFR 542 (1991)). *Madigan*, 503 U.S. at 143. Thus, *Madigan* did not involve a *statutory* scheme which set forth exhaustion requirements.

To interpret *Madigan* as abolishing all exceptions to statutory exhaustion would require overturning *Walker v. Southern Railway Co.*, 385 U.S. 196 (1966) and the numerous circuit decisions cited. This clearly was not the intent or effect of the dicta in *Madigan*, since the Court cited *Walker* approvingly. *Madigan*, *Id.* at 147. Accordingly, the court of appeals has misconstrued *Madigan*. Far from overruling established precedent cited here, including this Court's decision in *Walker*, *Madigan* pronounced that this "Court's precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion" and cited *Walker* to support the exception when a party will suffer prejudice due to an unreasonable timeframe for administrative action. *Id.* at 146-47.

Petitioners urge the Court to clarify that *Madigan* should not be read as creating an absolute, unwaivable limitation for judicial review or as abolishing all exceptions to statutory exhaustion.

II. This Case Presents the Rare Circumstances That Requires An Exception To Statutory Exhaustion

There can be no doubt that the exclusion of Dr. Hagelin substantially thwarted the NLP's ability to obtain valuable votes which lead to federal campaign funding. Unlawful denial of access to the debates certainly affects the campaign funding from the United States government, which in turn affects both the then-current election, and party building in the future. When a third party is deprived of access to free televised debates it loses both votes and this corresponding funding — regardless of whether it had a realistic chance of winning. The district court acknowledged as much, stating that the televised debates were "not only important but probably vital and essential" to cam-

paigns. App. A-22. Further, the CPD admitted that in the 1988 and 1992 elections, "more voters based their balloting decision on the debates than any other single factor." Reply Brief, Tab 3. Thus, there is no dispute that the debates have become a critical element of the presidential election process. CPD Brief at Tab 1, p.2 ¶6.

For the Petitioners to have waited for the FEC to act was to simply consent to the CPD's violation of the FECA and to the irreparable harm inflicted therefrom to Petitioners' Presidential campaign. The debates were only weeks away and the general election only six weeks away. Dr. Hagelin had met the objective portions of the CPD's criteria in that he qualified for federal matching funds, was on the ballot in a sufficient number of states to be elected and met the constitutional requirements to be president. Only a handful of candidates of *any* national party met those requirements. The FEC could not act in a timely manner and, in fact, advised Petitioners that it would be unable to make a determination in response to the NLP complaint prior to the staging of the first debate. Even worse, the FEC administrative procedures prevented action on the NLP complaint prior to the general election. Thus, the NLP's only resort was to the courts in an attempt to protect its interests and the integrity of the electoral process.

Participation in the debates is essential for any challenger to an incumbent, whether it be the Republican candidate or the NLP candidate. Because the FEC was powerless to act for at least 120 days, the electoral process was regrettably entrusted to the privately controlled and funded, bipartisan, CPD. According to the decisions below, the courts are powerless to hear actions rightfully brought by an aggrieved party pursuant to the FECA to prevent the CPD's unpoliced violations of the FECA.

If these are not the type of exigent circumstances in which the exhaustion requirement should be waived, it is difficult to believe that such an exception can ever occur.

III. The Issue Will Arise Again

The 1996 election has come and gone but the issue whether there is an exception to the FECA's mandatory exhaustion requirement will recur. Furthermore, for the 2000 elections, Petitioners will once again be participants in the election process and will once again seek inclusion in the debates. The underlying issue whether the district court should have exercised its "virtually unflagging obligation" to exercise jurisdiction (*Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976)) or whether statutory exhaustion is required *in every situation* is not mooted by the fact that the Debates have been held and the elections concluded.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 3, 1996

Decided October 4, 1996

Issued October 11, 1996

No. 95-5287

Ross Perot, Pat Choate, and Perot '96, Inc.,
Appellants

v.

Federal Election Commission,
and the Commission on Presidential Debates,
Appellees;

No. 96-5288

Dr. John Hagelin, Dr. Mike Tompkins, and the
Natural Law Party of the United States of America,
Appellants

v.

Federal Election Commission,
the Commission on Presidential Debates,
Appellees.

Appeals from the United States District Court
for the District of Columbia

(96cv2196 & 96cv2132)

Thomas O. Gorman argued the cause for appellants Ross Perot, et al., with whom *Samuel W. Lanham, Jr.*, *Jamin B. Raskin*, and *Thomas O. Sargentich, pro hac vice*, and *Robert E. Steinberg* were on the briefs.

Thomas M. Newmark argued the cause (*pro hac vice*) for appellants Dr. Hagelin, et al., and was on the brief.

Richard B. Bader, Associate General Counsel, argued the cause for appellee Federal Election Commission, with whom *Lawrence M. Noble*, General Counsel, was on the brief.

Lewis K. Loss, Attorney, argued the cause for appellee Commission on Presidential Debates, with whom *William H. Briggs, Jr.*, was on the brief.

JUDGES: Before: SILBERMAN, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed *Per Curiam.*

Per Curiam: Two days hence a series of debates between candidates nominated by the Democratic Party and the Republican Party for President and Vice President of the United States is scheduled to begin. One day ago this court heard argument concerning those debates. The case was argued before the district court on October 1, 1996. In view of the importance of the issues and the short time remaining before the debates begin, this court granted the motions for expedited review.

Appellants in these consolidated appeals are Ross Perot and Pat Choate, the presidential and vice-presidential nominees of the Reform Party, and their campaign organization, Perot '96, Inc. (collectively "Perot"); and Dr. John Hagelin and Dr. Mike Tompkins, the nominees of the Natural Law Party of the United States, and their party (collectively "Dr. Hagelin"). They appeal from the denial of injunctive relief and the grant of summary judgment to the Federal Election Commission ("FEC") and the Commission on Presidential Debates ("CPD"). Appellants now raise only two contentions. Perot contends that the FEC has unlawfully delegated legislative authority to a private, non-profit corporation, in violation of Article I of the Constitution. Dr. Hagelin contends that the district court erred in granting

summary judgment on the grounds that it lacked jurisdiction to enjoin a violation of the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431 *et seq.* (1994), despite the inability of the FEC to address the violation prior to the 1996 presidential debates scheduled by the CPD to begin on October 6, 1996. Hence, we do not address the merits of appellants' other claims, presented to the district court, that they were wrongfully excluded from the debates. On the issues before this court, we find no merit to Perot's constitutional challenge or Dr. Hagelin's contentions. As to the validity of the FEC regulation at the center of this controversy, we conclude that the grant of summary judgment sustaining it was premature. Accordingly, we affirm the denial of injunctive relief, vacate the grant of summary judgment relating to the claim that the regulation is inconsistent with the statute, and remand with instructions to dismiss the regulatory claim without prejudice.

I.

The CPD is a private, non-profit corporation formed in 1987 for the purpose of sponsoring presidential debates. In prior years, that task had been performed by another non-profit entity, the League of Women Voters. Beginning with the 1988 presidential election, the CPD assumed that function. The members of the CPD include a former chairman of the Democratic National Committee, a former chairman of the Republican National Committee, and other representatives of the Democratic and Republican parties. In connection with the 1996 presidential election, the CPD has scheduled a series of two presidential and one vice-presidential debates, with the first presidential debate scheduled to take place on October 6, 1996. The only candidates invited to participate are President William Jefferson Clinton and former Senator Robert J. Dole, the respective nominees of the Democratic and Republican Parties, and their vice-presidential running mates. The CPD, relying on its preannounced criteria, and the recommendation of an advisory committee

consisting primarily of political scientists, based its decision to exclude other candidates on the grounds that no other candidates have a "realistic chance of winning" the 1996 election.

To understand the nature of appellants' claims, we set forth the underlying statutory and regulatory framework. The FECA prohibits "any corporation" from making "a contribution or expenditure in connection with" any federal election.2 U.S.C. § 441b(a). Both a "contribution" and an "expenditure" are defined to include, *inter alia*, any advance of "anything of value ... for the purpose of influencing any election for Federal office." *Id.* § 431(8)(A)(I); *id.* § 431(9)(A)(I). An "expenditure" does not, however, include "nonpartisan activity designed to encourage individuals to vote or to register to vote." *Id.* § 431(9)(B)(ii).

As early as 1976, the FEC recognized that § 441b could be construed to bar the use of corporate funds to stage debates. *See* 44 Fed. Reg. 59,162 (1979). To remove doubt about the legality of corporate sponsorship of debates, the FEC promulgated a regulation incorporating its view that "nonpartisan debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate," and thus "funds expended . . . to defray costs incurred in staging nonpartisan debates" ought not run afoul of § 441b. 44 Fed. Reg. 76,734 (1979). The current version of this regulation, to be codified at 11 C.F.R. § 110.13, was transmitted to Congress in December 1995, and became effective March 13, 1996. It provides that eligible non-profit organizations may stage candidate debates, so long as they "use pre-established objective

criteria to determine which candidates may participate in a debate."[1]

On September 19, 1995, approximately six months before the effective date of § 110.13, the CPD announced its selection criteria for participants in the 1996 presidential debates. The CPD had concluded that the historical prominence of Democratic and Republican nominees warranted an invitation to the respective nominees of the two major parties in 1996. With respect to "non-major party candidates," the CPD announced criteria by which it could identify those who had" a realistic (i.e., more than theoretical) chance of being elected." These criteria included evidence of national organization (such as placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority), signs of national

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[1] The regulation reads in relevant part:

§ 110.13 Candidate debates.

(a) *Staging organizations.* (1) Nonprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 C.F.R. 114.1(f).

* * * *

(b) *Debate Structure.* The structure of debates staged in accordance with this section and 11 C.F.R. 114.4(f) is left to the discretion of the staging organization(s), provided that:

(1) Such debates include at least two candidates; and

(2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) *Criteria for candidate selection.* For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. . . .

11 C.F.R. § 110.13.

newsworthiness (as evidenced, for example, by the professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks), and indicators of public enthusiasm (as, for instance, reflected in public opinion polls). On September 17, 1996, the CPD issued a press release indicating its conclusion that no candidate other than President Clinton or Senator Dole had a realistic chance of being elected, and that, therefore, only those candidates and their vice-presidential running mates, would be invited to participate in the debates.

On September 6, 1996, Dr. Hagelin filed an administrative complaint against the CPD with the FEC, asserting that the CPD violated 11 C.F.R. § 110.13(c) by using subjective criteria to choose whom to invite as participants in its debates and by inviting President Clinton and Senator Dole based solely on their nominations by the Democratic and Republican parties. On September 13, Dr. Hagelin filed a verified complaint against the FEC and the CPD in the United States District Court for the District of Columbia seeking to enjoin the CPD from using unlawful debate selection criteria or, in the alternative, to order the FEC to take immediate action on his complaint as well as authorize it to take expedited action against the CPD's alleged violations of FECA.

Meanwhile, on September 20, 1996, Perot filed an administrative complaint against the CPD with the FEC. He too challenged the CPD's application of its selection criteria. On September 23, 1996, Perot filed a verified complaint in the district court, requesting that the court enjoin the FEC and the CPD from violating FEC regulations, the FECA, and various constitutional provisions

The FEC and the CPD filed motions to dismiss the complaints. The district court consolidated the cases for argument, and, after expedited briefing, heard oral argument and ruled from the bench on October 1, 1996. The district court denied appellants'

requests for preliminary injunctive relief. Applying the factors set forth in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 841, 843 (D.C. Cir. 1977), the court determined first that neither Dr. Hagelin nor Perot could show a likelihood of success on the merits. The court noted that Congress had granted the FEC exclusive primary jurisdiction to adjudicate civil claims under the FECA, and it emphasized that the FECA precluded its exercise of jurisdiction over the instant claims until the FEC acted on the claims or until 120 days after those claims had been filed. The district court then looked to the balance of equities presented in the appellants' claims for injunctive relief. This factor also weighed against Dr. Hagelin and Perot, as the damage they would suffer if the debates were to be held without their participation could at least be partially remedied in subsequent proceedings, and in any event it did not outweigh the public interest in allowing the debates to go forward without interference.

In addition to denying both appellants' claims for injunctive relief, the district court rejected Perot's claim that the CPD threatened a violation of his First Amendment right to freedom of speech. Relying on *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987), the court held that no such claim could lie against CPD since it was not a state actor. The court summarily rejected Perot's equal protection, due process, and nondelegation claims. Finally, the court, treating the motions to dismiss as motions for summary judgment, granted summary judgment for the FEC on the claim that § 110.113 was beyond the scope of its statutory authority. Fed. R. Civ. P. 12(b), 56. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), the court found the regulation a permissible interpretation of FECA's exemption from the definition of "expenditure" nonpartisan activity designed to encourage individuals to vote.

II.

We agree with the district court that it lacked jurisdiction to adjudicate the validity of the complaints filed with the FEC or to order the FEC to do so before the CPD-sponsored debate on October 6, 1996. Accordingly, we affirm the district court's dismissal of these claims on jurisdictional grounds.

Congress could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA. The statute explicitly states that "except as provided in section 437g(a)(8) of this title, the power of the [FEC] to initiate civil actions under subsection (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. § 437d(e); accord 2 U.S.C. § 437c(b)(1) ("The [FEC] shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act. . . .The [FEC] shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.").

Section 437g requires the FEC to proceed with due deliberation after it receives a complaint alleging violations of the Act. 2 U.S.C. § 437g(a)(1). Dr. Hagelin filed his complaint with the FEC on September 6, 1996; Perot filed his complaint on September 20, 1996. CPD,] which is alleged to have violated the Act, had to be notified within 5 days. *Id.* § 437g(a)(1). We presume this was done. The next step is for the FEC to vote to determine whether there is reason to believe the subject of the complaint has violated the Act. *Id.* § 437g(a)(2). If the complaint is not dismissed at that stage, the FEC conducts an investigation. *Id.* If the FEC's general counsel recommends that the FEC proceed to the next statutory step — a vote on whether there is probable cause to believe the respondent violated the Act — the respondent is notified and is given 15 days to submit a brief stating its legal and factual position and replying to the general counsel's brief. *Id.* § 437g(a)(3). If the FEC then decides there is probable cause, it "shall attempt, for a period of at least 30 days," or at least

15 days if an election is imminent, to have the respondent correct or prevent the violation. *Id.* § 437g(a)(4)(A)(i) & (ii). The FEC may skip this step and refer the matter to the Attorney General for enforcement action only if it determines that the violation is knowing and willful and only if the violation is of a type included in § 437g(d). *Id.* § 437g(a)(5)(C).

Other procedural requirements, unnecessary to mention, also bind the FEC's deliberations about, and investigation of, complaints. The end of the administrative road is a civil complaint filed by the FEC in the district court or an action by the complaining party. Section 437g(a)(8)(A) states: "any party aggrieved by an order of the [FEC] dismissing a complaint filed by such party under paragraph (1), or by failure of the [FEC] to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia." Id. § 437g(a)(8)(A).[2] The district court's decision may be appealed to this court. *Id.* § 437g(a)(9).

Dr. Hagelin claims that we may ignore these elaborate statutory requirements and force the FEC to act immediately because otherwise he would suffer irreparable harm. To do so, however, would place us in conflict with our decision in *In re Carter-Mondale Reelection Committee, Inc.*, 206 U.S. App. D.C. 133, 642 F.2d 538 (D.C. Cir. 1980). *Carter-Mondale* is, as the FEC argues, directly on point. The plaintiffs in that case asked the court to find a violation of the federal election laws, and requested alternatively "that the FEC be directed to conduct an immediate investigation of the [plaintiffs'] charges." *Id.* at 542. The court held that "the exclusive jurisdiction of the FEC

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[2] Apart from § 437g(a)(8)(C), there is no private right of action to enforce the FECA against an alleged violator. *See Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989); *see also Cort v. Ash*, 422 U.S. 66, 82-85 (1975)..

extends to assure that the [FEC's] initial investigation is completed, or the statutory time limit allowed for an investigation has expired, before any judicial review is invoked." *Id.* It therefore declined to hear the case because" the entire matter at this time is within the exclusive jurisdiction of the Federal Election Commission." *Id.*

It is true, as Dr. Hagelin points out, that the *Carter-Mondale* opinion said there might be extraordinary circumstances allowing a party to "hurdle the explicit time restraints of the [Federal Election Campaign] Act." 642 F.2d at 543. But the opinion never specified what these circumstances might be. It did not indicate on what basis, short of holding § 437g unconstitutional (which no one urges), a court could disregard the statutory commands. And the statement in *Carter-Mondale* was made before the Supreme Court instructed us that if "Congress specifically mandates, exhaustion is required." *McCarthy v. Madigan,* 503 U.S. 140, 144, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992). Section 437g is as specific a mandate as one can imagine; as such, the procedures it sets forth — procedures purposely designed to ensure fairness not only to complainants but also to respondents — must be followed before a court may intervene. We assume that in formulating those procedures Congress, whose members are elected every two or six years, knew full well that complaints filed shortly before elections, or debates, might not be investigated and prosecuted until after the event. Congress could have chosen to allow judicial intervention in the face of such exigencies, but it did not do so. And as we have said, a court is not free to disregard that congressional judgment.

Even if we could somehow ignore the jurisdictional requirements of § 437g(a), *but see Carter-Mondale*, 642 F.2d at 542, Dr. Hagelin could not achieve the result he seeks. This court could not compel the FEC to enforce its regulation in accordance with the FECA. We have interpreted § 437g(a)(8)(C) to allow nothing more than an order requiring the FEC action when the FEC's

failure to act is contrary to law. *See FEC v. Rose*, 256 U.S. App. D.C. 395, 806 F.2d 1081, 1084 (D.C. Cir. 1986). Since the FEC is given 120 days to act on a submitted complaint, § 437g(a)(8)(A), its delay in this case is neither unlawful nor unreasonable. *See Rose*, 806 F.2d at 1084-85. Second, if this court were to enjoin the CPD from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the CPD's First Amendment rights. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976) (prior restraint); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995) (speaker's choice of content).

III.

In addition to the statutory arguments, Perot also raises a novel constitutional claim. As we understand it, he contends that the FEC's "candidate debates" regulation unlawfully delegates legislative authority to a private, non-profit corporation, in violation of Article I of the Constitution In fact, this attack on the regulation rests on what might be termed a subdelegation of authority theory, since the claim is that the Congress has delegated authority to the FEC, which in turn has delegated some portion of that authority to the CPD. The FEC acknowledges that we have jurisdiction under 28 U.S.C. § 1331 to decide this issue, although it questions whether Perot is entitled to any relief. We agree that we have jurisdiction over the claim, but we are unpersuaded that the regulation delegates legislative authority to the CPD.

It is well established that Congress may, by a legislative act, grant authority to an executive agency such as the FEC to adopt rules and regulations, so long as it provides some "intelligible principle" by which the agency is to exercise that authority. *Mistretta v. United States*, 488 U.S. 361, 372, 102 L.Ed. 2d 714, 109 S. Ct. 647 (1989) (quoting *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 72 L. Ed. 624, 48 S. Ct. 348 (1928)).

We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor such as the CPD. *Cf. A.L.A. Schecter Poultry Corp. v. United States,* 295 U.S. 495, 537, 79 L. Ed. 1570, 55 S. Ct. 837 (1935).

In the cases before us, however, the FEC has not delegated any authority to the CPD. It has issued a regulation permitting eligible nonprofit organizations to stage candidate debates, provided that they employ "pre-established objective criteria" to determine who may participate. Rather than mandating a single set of "objective criteria" all staging organizations must follow, the FEC gave the individual organizations leeway to decide what specific criteria to use. 60 Fed. Reg. 64,262 (1995). One might view this as a "delegation," because the organizations must use their discretion to formulate objective criteria they think will conform with the agency's definition of that term. But in that respect, virtually any regulation of a private party could be described as a "delegation" of authority, since the party must normally exercise some discretion in interpreting what actions it must take to comply.

The contention that the regulation delegates authority to the CPD because it does not spell out precisely what the phrase "objective criteria" means goes far beyond the normal usage of the term "delegation." This position would go further than the position of Justice Scalia, who dissented from the Supreme Court's decision in *Mistretta* that a congressional grant of rulemaking authority to the United States Sentencing Commission was not an unconstitutional delegation of legislative power, but acknowledged that "no statute can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it. . . ." 488 U.S. at 415 (Scalia, J., dissenting). So too, a regulation's use of a term that may be susceptible to differing interpretations does not automatically result in a delegation of authority to the entities that it governs.

Here, the FEC has chosen to give the CPD and any other organizations that wish to sponsor debates the latitude to choose their own "objective criteria." In adopting such standards, a staging organization acts at its peril, unless it first secures an FEC advisory opinion pursuant to 2 U.S.C. § 437f. Without such an opinion, the organization runs the risk that the FEC will subsequently determine that its criteria are not objective, and that its sponsorship of the debate violated § 441b. If that happens, the staging organization may be subject to the penalties provided in the FECA. The authority to determine what the term "objective criteria" means rests with the agency, however, and to a lesser extent with the courts that review agency action.

In sum, we are unpersuaded that the FEC has unconstitutionally delegated legislative authority to the CPD. At oral argument counsel suggested that this court should order the FEC, either through mandamus or some other extraordinary remedy, to "take back" the authority it has "delegated" to the CPD. As we understand this argument, Perot seeks to have the FEC either withdraw its regulation or revise it to define in detail what are "objective criteria." It is unclear how the FEC could accomplish this goal in time to have any effect on the presidential debates. Before prescribing new regulations, the FEC must transmit a statement of its proposed action to Congress, and the regulation may not take effect until thirty legislative days have passed. 2 U.S.C. § 438(d). Nor may the FEC render an advisory opinion concerning the legality of the CPD's preannounced criteria upon request of a third party. *Id.* § 437f(a)(1). As noted in Part II, a complaint is subject to the statutory timetable that also would preclude relief prior to the debates.

IV.

Before the district court, Perot also argued as an appendage to the request for a preliminary injunction that the FEC lacked authority to promulgate 11 C.F.R. §§ 110.13 and 114.4(f) and

that the regulations carve out an illegal exception to the corporate contribution and expenditure limits of 2 U.S.C. § 441b. On appeal Perot mentions this argument — that the FEC's debate regulation, 11 C.F.R. § 110.13, is *ultra vires* — only in a footnote of his brief, and counsel did not address it at oral argument.

The district court granted summary judgment on this claim, finding the regulations permissible under 2 U.S.C. § 431(9)(B)(ii), which exempts from the definition of "expenditure" "nonpartisan activity designed to encourage individuals to vote or to register to vote." Perot's footnote claims that the CPD's sponsorship of debates does not fall within this exemption, primarily because it is not truly nonpartisan. We need not reach the merits of this contention.

The FECA has no provisions governing judicial review of regulations, so an action challenging its implementing regulations should be brought under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Among other things, the APA directs courts to consider the administrative record in determining the legality of agency action. *Id.* § 706. Perot has not invoked the APA, and no party has produced the administrative record. *See* Fed R. App. P. 15, 17. Consequently, the district court did not have the opportunity to consider the regulations' legality in terms of that record or the APA and the case law under it. Especially since we do not have the administrative record before us, and this issue was not fully briefed, we will refrain from reviewing the district court's grant of summary judgment. The case is simply not in a posture to permit an important question of this sort to be properly adjudicated.

Accordingly, we remand this part to the district court with instructions to dismiss without prejudice only Count IV of Perot's complaint, which raises this claim. Perot will then be free to file a new suit properly challenging the FEC's authority to

promulgate the regulations. He will not suffer unduly from any delay in resolving this issue, as even an immediate order invalidating the regulations would not provide him with any meaningful relief from the alleged harms. In all other respects, the district court's order is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 96-2132

DR. JOHN HAGELIN, DR. MIKE TOMPKINS, and the NATURAL LAW PARTY,
Plaintiffs,

vs.

FEDERAL ELECTION COMMISSION, and COMMISSION ON PRESIDENTIAL DEBATES,
Defendants.

Washington, D.C.
October 1, 1996
2:02 p.m.

Civil Action No. 96-2196

ROSS PEROT, PAT CHOATE, and PEROT, '96, INC.,
Plaintiffs,

vs.

FEDERAL ELECTION COMMISSION and COMMISSION ON PRESIDENTIAL DEBATES,
Defendants,

TRANSCRIPT OF BENCH RULING
BEFORE THE HONORABLE THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

THE COURT: The Court is going to dictate a bench opinion at this time — or announce a bench opinion; it's not dictating; it's spontaneous, as opposed to written out — because of the, as I mentioned earlier, the exigencies of the case and the need for the public and the candidates and the parties before the Court, the agencies, and the Debate Commission to have a ruling by this Court in light of the oncoming debates this Sunday. I'm going to try to make a brief review of the status of the case and the issues

pending before the Court and then make a ruling on the request for preliminary injunction and the motions that have been filed.

All right. First, the Court wants to recognize and thank counsel for their hard work in an expedited fashion in this serious matter, the counsel: Mr. Lanham, Mr. Raskin, Mr. Sargentich, and Mr. Steinberg assisting them and their other assistants; for the Natural Law Party, Mr. Newmark and Mr. Vogel as well; on the defense side, Mr. Loss and Mr. Briggs, Ms. McGraw, and others for the Commission on Presidential Debates; and for the Federal Election Commission, Mr. Hershkowitz and his assistants.

The Court had set a very tight time frame in this matter, and although it's on the public record, it may not be generally known, there were multiple motions to intervene by various pro se litigants that the Court denied and motions by the Green Party and by Mr. Nader and by the Rainbow Coalition, Mr. Jackson, to either file an amicus brief or, in Mr. Nader's case, to intervene. That was denied, but I allowed them both to file amicus briefs, briefs to assist the Court that I've considered as well on these issues.

The first case was Dr. John Hagelin and others, the Natural Law Party, versus the Federal Election Commission, was filed here on September 6 and had — I'm sorry, they had filed, I believe, an administrative complaint on September 6 to the Federal Election Commission, and on September 13 of this year, they filed this litigation.

On September 20, the Perot plaintiffs filed an administrative complaint with the Commission. On September 23, they then filed this litigation. I consolidated these two cases for the purpose of argument and so that we combined them on today's hearing schedule.

The parties, since this is October 1, literally in one week have briefed fully the issues in this case, have had oppositions filed

and reply briefs received as late as last evening that the Court and the parties worked on.

What the Court intends to do is, as it said, dictate its opinion in this matter at this time. It hopes that the time frame will be such it will be able to issue a fuller analysis and a written opinion in a few days, but because, as I've said, of the need for a decision, in fairness to the parties, I'll issue this bench opinion. It will rule upon the preliminary injunction and the motions that are pending to dismiss.

I will announce my ruling and then give the rationale, that is, the findings of fact and conclusions of law under the preliminary injunction standards under rule 65 and then the rulings on the motions to dismiss as well, and follow that by an entry of an order on the docket for appellate purposes as may be necessary.

The preliminary injunction requested in both cases, for instance, in the Perot case, Mr. Lanham — I didn't recognize Mr. Lanham — in the Perot case, the remedies sought in their brief indicates that the plaintiffs recognize the Court should not unnecessarily intrude in the election process and it does not have authority to order the debates occur, select the participants in those debates, but argues it does have jurisdiction to guide the decision-making process of the CPD, that is, the Commission on Presidential Debates, to ensure it conforms to legal requirements and suggests that the Court review the criteria, inform defendants of the criteria it considers objectives, and lists three criteria that are objective, and that the Court allow that the plaintiffs, Mr. Perot and Mr. Choate, who meet those objectives, the objective criteria the plaintiff lists as objective, and order that the CPD allow them then to participate in the debates and that at least I should identify the criteria that they have set forth as the only pre-established objective criteria and enjoin the Commission on Presidential Debates from applying any debate selection criteria other than those pre-established objective criteria as set forth by the plaintiff that should be used.

In the alternative, they ask the Court to declare the debate regulations of the FEC to be ultra vires and unconstitutional and enjoin any further CPD or corporate spending on these debates.

Likewise, the Natural Law Party and Dr. Hagelin and Dr. Tompkins pray that the Court issue a temporary restraining order or preliminary injunction enjoining the CPD from using unlawful subjective selection criteria in requiring it to establish its preestablished subjective criteria or, in the alternative, ordering the FEC to make an immediate decision on the violations and authorizing it to take expedited action against the violations.

This case presents a rather unique issue for this Court that has not been directly decided before in this circuit and perhaps in any circuit as to the granting of a preliminary injunction that either would order, in essence, the attendance of certain individuals at the debates or stop the debates based upon the plaintiffs' assertions that the criteria, at least under the regulatory argument, that the criteria used were inappropriate, being subjective, and therefore the debates cannot go forward until appropriate criteria are drafted and established, and secondary to that, that the Court should indicate which criteria are appropriate so that debates could go forward with the individuals who may then fall under the criteria.

The arguments have consisted of, as I've said, not only the briefs and the additional materials and exhibits filed and affidavits, but also the presentations this morning by counsel that the Court has considered.

The Court is going to make the following ruling at this time on the preliminary injunction request following the factors that I must use in any preliminary injunction case in this circuit under *Washington Metropolitan Area Transit Authority v. Holiday Tours,* 559 F.2d 841, 843, a 1977 circuit case. The factors are the likelihood of success on the merits; whether without this relief the movants have shown they'll suffer irreparable injury; the

balance of the equities or harm to other parties, as they say: and finally, wherein lies the public interest.

Applying those factors, the Court is going to deny the motion for preliminary injunction in both cases, the case of Mr. Hagelin and the Natural Law Party and the case of Mr. Perot and the Perot Party — Reform Party at this time. As I have said, this bench opinion will be the findings of fact and conclusions of law giving the rationale for this decision.

While recognizing that the debate medium through the TV and the exposure is not only important but probably vital and essential in today's world of electronic communication, vastly different than referred to earlier in the Lincoln-Douglas debates, where it was a room perhaps of this size that the debates occurred in or outdoors with a group of people, today to really meaningfully communicate, it is, I would believe most will agree, essential that the candidates have access to TV.

Unfortunately, more people watch the TV and get their impressions, make their decisions perhaps from the TV exposure than they do from the print media in today's world. Perhaps someday we'll be doing virtual debates over the Internet, where this won't be the same problem, but right now we're faced with these issues of the participation of Mr. Perot and his party and his vice presidential candidate, Mr. Choate, and the Natural Law Party, Dr. Hagelin and his vice presidential candidate, Dr. Tompkins, to participate in the debates scheduled for October 6, this Sunday evening.

While recognizing the important interest and need, as I've said, for communication through the TV medium and access to the TV by the third-party candidates to establish their credibility with the electorate, it's apparent to the Court, after review of the authorities and the case law and the statutory framework of the Federal Election Commission, that the~ likelihood of success on the merits, whether I'm treating the statutory/regulatory claims

of the Natural Law Party or, we use the terminology Perot Party to incorporate the various Perot plaintiffs, as to their statutory/ regulatory claims, that there is substantial barriers to the likelihood of success on the merits that the plaintiffs have simply not overcome that I had to be convinced they could before I could grant a motion for preliminary injunction.

The Court recognizes the frustration and perhaps this, I think, admitted by the defendants perhaps unfairness in the process that does not allow all those who consider themselves legitimate candidates for our most important office in the country to fully participate, but I believe the complaint should be with Congress and the statutory framework established for the FEC to operate and that this carefully crafted statute and the regulations promulgated by the FEC under their authority and expertise are not easily challenged.

The first issue to look at under the statutory claims of the Natural Law Party and the Perot plaintiffs is the jurisdictional problem, where Congress set forth very precise procedures and, after case decisions, amended the statute to reflect a more timely review of certain areas that could be raised or questions that could be raised as the elections approached.

Congress obviously knew the problems — they are politicians who face election every two years in the House and every six in the Senate — that could occur if-the election process, electoral process was interfered with by the courts willy-nilly and therefore prescribed the election laws as it has under the Federal Election Commission Act.

They easily could have, because they responded to certain case decisions, the *Cort v. Ash* case for one, amended the statute to create exceptions for procedures for cases like this one and could have certainly said in extraordinary circumstances the courts may intervene and grant injunctions, etc., but they did not, even though they have considered issues, obviously, of timing

and concern to have the parties heard and grant a relief prior to elections mooting out the issues they've raised.

Congress created the FEC to hear issues such as this I'm talking now on the statutory/regulatory claims — such as these issues and set up a procedure forth for them to do that. This Court has ruled, as other courts have ruled, the FEC is bound by those procedures and must follow those.

In this case, complaints have been filed with the FEC that the criteria used were not in accordance with their regulation and that violated the statute and that they should be granted some relief. There's no indication that the FEC is not doing other than they're prescribed to do by statute, that is, investigating the complaints, and will in due course rule upon them, and the plaintiffs, if dissatisfied, can eventually come to court.

That brings the case to the Court then to look at the futility issue, should that overcome this grant of exclusive jurisdiction to the FEC, and that was amended. The statute now, instead of reading primary, reads exclusive primary jurisdiction for the FEC.

The defendants have argued, the FEC, there is basically~ no case in which the Court could grant relief, that the exclusive~ and sole jurisdiction always lies with the FEC, and no matter what the circumstance could be, the Court could not intercede.

As argued to this Court by Mr. Newmark, who referred to the *Rafeedie* case with Justice — Judge then, I believe, now Justice Ginsburg, and tried to analyze the difference in the exhaustion requirements and original jurisdiction or subject matter jurisdiction and came up with a, there's something different between that and the classic jurisdiction requirement~ such as diversity, etc., that has some appeal to the Court in it analysis, and I believe that the Court may be able in certain extraordinary circumstances to hear a case if the pursuit of the~ FEC remedy would be futile.

However, in this case, I do not see the plaintiffs are so different from other cases, such as the *Carter- Mondale Re-election Committee v. FEC,* 642 F.2d 538, a 1980 D.C. Circuit case. There the plaintiffs were making claims that were even perhaps more urgent than here involving the approaching presidential election by the one group of the presidential candidates essentially complaining about the other presidential candidates accepting illegal funds, etc., and were found not to have met the futility exception, and that involved the two presidential candidates with the election close upon them, and therefore, the Carter-Mondale people could not get relief even though they may have had a legitimate complaint.

In this case, we have the situation of Mr. Perot and his party and the Natural Law Party and Dr. Hagelin complaining they cannot get relief in time and the debate is close upon them. It's not the final presidential election they're challenging in November, but a preliminary step which the Court has recognized is important but does not seem it overcomes the Carter-Mondale rule that was established in this circuit as to have met a futility exception, even if one should exist, but I believe the language of the case law referred to, *NCPAC* and others, does recognize there may be a hurdle over which the plaintiffs could leap in the appropriate case, but I do not find it exists here. As to their likelihood of success on the merits it does not seem that the plaintiffs have a situation that would meet that exception.

Also, as to the remedy that may be available, I've referred to the relief sought by the plaintiffs in their motion~ that would have the Court order either criteria be accepted by the Presidential Debate Commission that I would say is the appropriate criteria, not the agency, the FEC, who is assigned this responsibility by Congress, and that I would rule that that criteria was met by the plaintiffs and essentially order they must attend then any debate that is then held, or I would rule eventually, I suppose, on the other hand there can be no debates until they redo the criteria,

which obviously could not happen i this presidential election cycle.

Weighing that against the plaintiffs not being able to partake in the debate or the remedy they may still pursue in their complaints to the FEC and may have a right to come back to this Court later on in the process that is provided by the Federal Election Commission Act, under 437g(a)(8), the Federal Election Commission lawyer asserted they would not be mooted out if they came back to court. What they would have lost if the FE doesn't agree with them and they have to come to court is the opportunity to debate, but they still may be able to cure any defects in the criteria they allege the Debate Commission has used so that the next cycle would not have these defects and thereby have some relief, although not total relief.

But weighing the interference of the Court — and I'm going not only to likelihood of success on the merits and irreparable injury, but balancing the equities and the public interest — the harm that could occur by the Court's interference in this process and the reaching that the Court must make to grant the preliminary injunction that it would have the right to set the criteria or choose which criteria already out there are appropriate and disallow other criteria, overriding the FEC's opportunity to do that as the agency assigned to do that by Congress, and considering the plaintiffs can still pursue this complaint later in court, albeit without partaking in the debates, and the harm to the public interest and having the debates go forward as presently set and not interfering with those, the Court comes down against the plaintiffs on that issue.

So that the Court is convinced, applying all the factors and even considering tin some sense the irreparable injury to the plaintiffs by not being able to participate in the debates, but not overall irreparable injury, since I believe the can still go forward with their complaints and eventually come to court if they're not

given appropriate relief, and recognizing that the third-party candidates who are not accepted for the debates have a stigma attached to them that they have been determined to be, I think the language given was losers already, that they lack the exposure and they will not be able to test their ideas in the crucible of a debate in front of the public, or, as urged by plaintiffs' counsel, they will not be able to take the job interview for the American public, and that they could lose as well the opportunity to earn additional federal funding by the level of votes that they can get if they are successful in running and collecting a certain percentage of the votes and that will hurt their opportunity to do that, I've considered all those factors and the irreparable injury, and weighing the chances of success, likelihood of success, and the harm to others and the public interest, and because of the statutory structure that I believe exists under the case law and its interpretation almost unanimously by all courts that this hurdle is great indeed, and following the scheme as put together by Congress, I do not believe the plaintiffs have shown a likelihood of success on the merits on their claims, and despite the fact they will suffer some injury, I do not believe it overcomes their, a lack of ability to succeed in this case.

The Court also had claims submitted to it on the injunction — then I'll get to the merits side in a minute on the motions — constitutional claims in the Perot suit only. Again, there was an objection to jurisdiction and claims against the FE and CPD as to their constitutional issues.

Again, applying the *Holiday Tours* factors, I'm going to find that there's no likelihood of success on the merits again on the constitutional claims. Simply put for the purpose of this bench opinion, the claims against the Commission on Presidential Debates, the constitutional claims, I believe, cannot succeed, because the plaintiff has not shown that the CPD is a state actor.

An example of that is *San Francisco v. USOC,* United States Olympic Committee, and again it was found not to be a state

actor despite it was under federal charter, got help from the government for fund raising, and certainly was in the area of public interest.

Here, where plaintiff has no right to participate in the debate, he's agreed to that under *Johnson v. FCC* out of this circuit, 829 F.2d at 163 to 164, an '87 D.C. Circuit case, therefore, there is no constitutional issue I believe the plaintiff can recover on in the Perot litigation.

The plaintiff had argued and analyzed the issues in the context of an analogy to political conventions or voter access or to the ballot, but we do not have that here with the decision of law in this circuit as to the there is no right to participate in this debate in any event and that at least at this time, there i not sufficient evidence to show that the CPD is really a state actor in any fashion.

Even going further to the merits of the constitutional claims, there's an argument that the equal protection clause of the 14th Amendment was ~violated by the CPD, and I do not see that available to the plaintiff in the context in which he's raised it. The same with the that a debate is not a public forum, where the plaintiff's First Amendment rights are being violated in any fashion.

And finally, he argued that his due process rights were ~violated because — under the Fifth Amendment, as in *Goldberg v. Kelly*, but where there's no right to debate under *Johnson*, there's no right to a hearing, notice, etc., so I do not see that applying.

The plaintiffs argued an issue it had raised in its reply brief heavily before the court today, and that is the FEC regulation at 11 C.F.R. 110.13 is ultra vires and unconstitutional interpretation of the FECA authority, because i permits corporate expenditures in violation of the FECA prohibitions.

The Court does not again find a likelihood of success on the merits of that claim. The FEC regulation has issued, the said, pursuant to the reference I made during argument to 2 U.S.C., Section 431(9)(B)(ii), which exempts from the definition of expenditures such nonpartisan activity designed to encourage individuals to vote, and then it goes on or to register to vote, so it included both the registration, but it also includes individuals to vote in general, that is, encourage them to go to the polls.

Obviously, the FEC in its expertise and using a *Chevron* analysis and deferring to their interpretation, it seems to me that their publication of regulations pursuant to the statute allowing expenditures to be exempted for nonpartisan activity, i seems it's not illogical to say that that appears to fit the statutory authority given to the FEC, and accepting their expertise, I do not see at this point a basis to declare ultra vires and unconstitutional that they have allowed under regulations private organizations to establish themselves for purposes of holding nonpartisan debates supported by corporate contributions.

Finally, the plaintiffs, the Perot plaintiffs claim the FEC has unconstitutionally delegated authority to the Debate Commission and that such delegation is unconstitutionally vague was raised. I had a hard time getting a handle on that. I think that I don't see any statutory authority delegated to the commission, and I think the claim is not that it was vague, but that they had precise criteria, they said, that the Debate Commission must establish, whatever group is set up to try to put on the debates that have to have this subjective criteria, and they're complaining their criteria accepted or used by the Debate Commission was inappropriate and not in accordance with the FEC rule. I don't see how that meets the unconstitutionally vague standard.

So again, I do not see a likelihood of success on the merits on the constitutional issues as raised by the Perot plaintiffs.

And finally, again, the irreparable injury, certainly share the concerns the parties have set forth and, as I've already articulated, that the Court has on this process, and perhaps in the future there will be a different process or the Presidential Debate Commission will be organized differently, with different qualifications in their criteria in the future, but that's not what I have before me now.

Certainly the previous courts that have considered interfering with debates or ongoing presidential elections have found substantial public injury if the debates are prevented from going forward or the elections are interfered with, and I believe that is the appropriate standard for the Court to consider.

And ultimately, there's a problem of redressibility, as I've referred to earlier, which is one of the factors to consider under the likelihood of success. As I mentioned, I do not think — and I — despite the parties' pleadings that I read in their motions, that the Court would be empowered to order Mr. Hagelin and Mr. Perot and their vice presidential candidates to participate in the debates, to require they be admitted and require that the two presidential candidates now in the debates continue their participation. I think everyone agrees that that would be beyond the Court's authority.

I think it's beyond the Court's authority to order CPD to use only certain of its criteria and I make the selection of which criteria. That does not go through any regulatory agency. That's one judge putting his imprimatur on certain criteria he believes is appropriate as urged by the parties, and those criteria, the ones that get them in the debate may not get others in the debate, and I begin to believe that that is not appropriate judicial rule making.

So that there's no guarantee that whatever the Court did today, if I found for the plaintiffs, the debates would take place under any of those circumstances. It's more likely that the best the Court would do if it found grounds to do so would be to order the

CPD and the FEC to go forward with the complaints on an expedited basis and to see what came out of that. In the meantime, I expect that that would sabotage the debates themselves, so no one would really succeed.

Finally, before — so I'm denying the motions for preliminary injunction for those reasons under rule 65. I've consolidated these hearings, as I've said, under the rules, and there have been motions to dismiss filed by both defendants as to both cases. I'm going to treat those motions to dismiss as motions for summary judgment, because there have been affidavits filed and supplementary exhibits given to the Court taking it out of the motion to dismiss category and putting it under motion for summary judgment.

Under *Celotex v. Catrett*, 477 U.S. 317, at 322, an '86 case that came from this circuit, the Supreme Court ruled summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party will bear the burden of proof.

I have gone back through these materials again in the context of the motions for summary judgment — I'm treating the motion to dismiss, as I've said, as summary judgment — to see whether or not there's any contested material issues of fact the parties have argued to the Court. In fact, there are none, that it is strictly a legal issue for the Court to consider this regulation under the statutory authority granted the FEC that they're questioning and the constitutional issues as raised by Mr. Perot.

Under the analysis I've given for the preliminary injunction, the Court is going to find that it should grant summary judgment on behalf of the defendants on the complaints herein, that the statutory claims that the CPD has violated the FEC regulations of 11 C.F.R. 110.13, again as I've indicated previously, I do not believe that they can establish that the FE has issued an ultra vires

or regulation that is beyond their authority to do so but that does fit in with the context of the *Chevron* analysis, their expertise in this area, where the statutory authority allowed them to have an exception for expenditures of nonpartisan activity designed to encourage individuals to vote, so that the establishment of regulatory scheme work by the FEC to allow private 501(c)-type organization to exist to put on debates does not seem to the Court at this time, as the parties submit it was a legal issue, to be beyond the FEC's power under FECA, and I'm going to grant summary judgment on the issues of the regulatory authority and that the CPD has violated those, also, because I've ruled that that first will have to go through the FEC process, the complaint process before it comes to this Court in any event.

Additionally, as to the constitutional claims, again as I've addressed them already, incorporating that analysis, I simply do not see any of those established as a legal issue at this time. There are no material facts of dispute, and because CPD is not a state actor under the case law, because there's no right to participate in the debate under the case law, there's equal protection clause or due process right that is trammeled upon by these regulatory regulations, and that I've already found the C.F.R. involved is not unconstitutional or ultra vires because it permits corporate expenditures, under that analysis then, there are no issues left for the Court to decide in the future, so that I'm going to grant summary judgment on behalf of both defendants and dismiss both cases at this time.

The Court is going to issue an order today incorporating this bench ruling. As I've said, if time allows, I'll issue a written opinion with perhaps a more articulate analysis of these issues, and it may be in the future, as I've already alluded, there will be a different arrangement in our debate system that has been set up under the FEC that would be perhaps more open and accessible to those who should be heard by the American public in a debate circumstance.

Sometimes one wishes we had more of the British system, where the party leaders debate many different characters, if you've ever been to Britain, and that they would appear and debate in Congress, as a matter of fact, as the prime minister has done. I think we're sort of at a point where it reminds me of the playoffs that are starting, in a baseball analogy, and we have the wild card team makes the playoffs but isn't allowed to play in the World Series eventually, even if it's succeeding well in the playoffs, and that's regrettable.

But under the case law and the statutory scheme work that's been established by Congress after notice of these types of concerns, I cannot find the plaintiffs can show, as I've already ruled, sufficient evidence to the Court that they can have a likelihood of success on the merits, and I have to grant summary judgment for the defendants.

I want to thank counsel for their work. I know it was extensive, time-consuming, and difficult over the last week. The Court had them on a very tight schedule and also on a tight argument schedule, and I appreciate their cooperation and excellent arguments they presented to the Court. All right. We'll stand in recess.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ Anneliese J. Thomson
Anneliese J. Thomson

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1996
96cv02132
96cv02196

No. 56-5287

Ross Perot, et al.
Appellants,

v.

Federal Election Commission and Commission on Presidential Debates,
Appellees.

Consolidated with 98-5288

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges.

ORDER

Upon consideration of appellants' (in No. 96-5288) Suggestion for Rehearing *in Banc,* and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/Robert A. Bonner
Deputy Clerk

APPENDIX D

Statute	Statutorily Mandated Exhaustion	Judicially Recognized Exceptions
IRS	**26 USC § 7432(d)(1)** "A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service."	*Information Resources, Inc. v. U.S.*, 950 F.2d 1122, 1127 (5th Cir. 1992). "Requiring [Plaintiff] to exhaust the administrative procedures would be a useless formality, and the law does not require a party to pursue a useless formality."
INS	**8 USC § 1105a(b)** "... any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 ... may obtain judicial review of such order by habeas corpus proceedings and not otherwise." **8 USC § 1105a(c)** "... an order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the ad-	*Rafeedie v. I.N.S.*, 880 F.2d 506, 526 (D.C.Cir. 1989) (Ginsburg, Ruth B. concurring). "... [A] statutory exhaustion requirement, unless Congress explicitly declares otherwise, does not impose an absolute, unwaivable limitation on judicial review; instead, it sets a condition that may be excused when insistence on exhaustion would threaten grave harm to the party seeking review and would not sensibly serve the purposes Congress envisioned in establishing that condition."

Statute	Statutorily Mandated Exhaustion	Judicially Recognized Exceptions
	ministrative remedies available to him as of right... ."	
MPPA	**29 USC § 1401(a)(1)** "Any dispute between an employer and the sponsor of a multiemployer plan concerning a determination made under sections ... [29 USC 1381-1399] shall be resolved through arbitration proceeding within a 60-day period... . **29 USC § 1401(b)(2)** "Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of the arbitrator's award, in an appropriate United States district court in accordance with [29 USC §1451] to enforce, vacate, or modify the arbitrator's award."	*Dorn's Transportation, Inc. v. I.A.M. National Pension Fund*, 578 F. Supp. 1222, 1226, 1227 (D.C.D.C 1984) (Hogan, J.). "Despite the inherent virtues of ... policies favoring prior arbitration, the exhaustion requirement must be evaluated in light of the circumstances presented by each case." . . . "[T]he Court finds the purposes of the exhaustion doctrine will not be served by referring purely legal questions to arbitration at this time.

Statute	Statutorily Mandated Exhaustion	Judicially Recognized Exceptions
ERISA	**29 USC § 1401(a)(1)** "Any dispute between an employer and the sponsor of a multiemployer plan concerning a determination made under sections ... [29 USC 1381-1399] shall be resolved through arbitration proceeding within a 60-day period... . **29 USC § 1401(b)(2)** "Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of the arbitrator's award, in an appropriate United States district court in accordance with [29 USC §1451] to enforce, vacate, or modify the arbitrator's award."	*Board of Trustees of the Construction Laborers' Pension Trust v. M.M. Sundt Construction Co.*, 37 F.3d 1419 (9th Cir. 1994). ERISA's arbitration clause is an exhaustion requirement, not a jurisdictional requirement; exceptions to exhaustion requirement exist where "arbitral process would be futile or would cause the plaintiff irreparable injury."

Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

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No. 96-1286

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HAGELIN, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

Section 437g(a)(8)(A) of the Federal Election Campaign Act of 1971 (FECA) provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under [Section 437g(a)(1)], or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. 437g(a)(8)(A). The questions presented are:

1. Whether petitioners' suit is moot where, because of the passage of time, the 120-day statutory period, from which petitioners sought an exemption, no longer precludes judicial review of their administrative complaint.

2. Whether the district court had jurisdiction over petitioners' suit with respect to alleged violations of the Act that are the subject of an administrative complaint pending before the Federal Election Commission, prior to the expiration of the 120-day statutory period.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 97 F.3d 553. The district court's oral ruling (Pet. App. A16-A33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1996. A petition for rehearing was denied on October 15, 1996. Pet. App. 34. The petition for a writ of certiorari was filed on February 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, permits "[a]ny person who believes a violation of th[e] Act * * * has occurred" to file a signed and sworn complaint with the Federal Election Commission (FEC or Commission). 2 U.S.C. 437g(a)(1). The FECA sets forth detailed procedures that the Commission must follow when it receives a complaint under Section 437g(a)(1). Within five days, the Commission must notify any person alleged in the complaint to have violated the Act, and that person (the respondent) then has 15 days to demonstrate, in writing, why no action should be taken against it. *Ibid.* The Commission may then vote on whether it has "reason to believe" that the respondent has violated the Act. 2 U.S.C. 437g(a)(2). If the Commission makes that determination, it notifies the respondent of the alleged violation and conducts an investigation. *Ibid.* If, at the close of the investigation, the Commission's General Counsel recommends that the Commission vote on whether there is "probable cause" to believe the respondent violated the Act, the respondent must be provided with a brief by the General Counsel and be given 15 days to submit a responsive brief. 2 U.S.C. 437g(a)(3).

If the Commission determines that probable cause exists, it must attempt for at least 30 days (or, if an election is imminent, at least 15 days) to correct the violation by informal methods and to enter into a conciliation agreement. 2 U.S.C. 437g(a)(4)(A)(i) and (ii). If the Commission is unable to correct a violation by informal methods, it may institute a civil enforcement action in federal district court. 2 U.S.C. 437g(a)(6)(A).

Section 437g(a)(8)(A) of the FECA provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under [Section 437g(a)(1)], or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. 437g(a)(8)(A). Under Section 437g(a)(8), the court "may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days." 2 U.S.C. 437g(a)(8)(C). If the Commission fails to so conform, "the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original [administrative] complaint." *Ibid.*

2. Petitioners in this case are the Natural Law Party of the United States and that party's 1996 presidential and vice-presidential nominees. On September 6, 1996, petitioners filed an administrative complaint with the FEC. The complaint alleged that the Commission on Presidential Debates (CPD), a private, nonprofit corporation formed to sponsor debates by presidential and vice-presidential candidates, had adopted unlawful criteria for the selection of participants in its upcoming 1996 presidential debates. Petitioners contended that the selection criteria violated Section 441b of the FECA, 2 U.S.C. 441b, and an FEC regulation, 11 C.F.R. 110.13, that permits certain nonprofit corporations to sponsor candidate debates without violating Section 441b's prohibition of corporate contributions. Petitioners requested that the Commission expedite its con-

sideration of their complaint so that they would have an opportunity to take further legal action before the first debate, which was scheduled for October 6, 1996. Pet. App. A6, A19.

3. One week later, on September 13, 1996, petitioners filed suit against the Commission and the CPD in the United States District Court for the District of Columbia. The complaint sought as relief an order enjoining CPD from employing the challenged selection criteria and, in the alternative, an order compelling the Commission to take immediate action on petitioners' administrative complaint against CPD. See Pet. App. A6.

In expedited proceedings, the district court consolidated petitioners' motion for preliminary injunctive relief with a hearing on the merits on October 1, 1996.[1] At the conclusion of that hearing, the court denied petitioners' request for preliminary injunctive relief and dismissed their claims for lack of subject matter jurisdiction. The court explained that Congress had granted the Commission "exclusive primary jurisdiction" to consider civil claims under the Act, and that the Act precluded the court from exercising jurisdiction in such matters until the Commission took final action, or until 120 days after petitioners' administrative complaint had been filed. See Pet App. A7, A23-A25.

4. The court of appeals granted expedited review. On October 4, 1996, it affirmed the district court's

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[1] That hearing was, in turn, combined with a hearing in another case against the Commission and CPD brought by the presidential and vice-presidential candidates of the Reform Party, who had also filed an administrative complaint with the Commission. Pet. App. A19.

dismissal of petitioners' claims on jurisdictional grounds. Pet. App. A1-A15. The court of appeals "agree[d] with the district court that it lacked jurisdiction to adjudicate the validity of the complaints filed with the FEC or to order the FEC to do so before the CPD-sponsored debate on October 6, 1996." *Id.* at A8. Congress, the court stated, "could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA." *Ibid.* (citing 2 U.S.C. 437c(b)(1), 437d(e)).

The court observed that "Section 437g requires the FEC to proceed with due deliberation after it receives a complaint alleging violations of the Act." Pet. App. A8. In light of that administrative framework, the court concluded that it could not "ignore these elaborate statutory requirements and force the FEC to act immediately because otherwise [petitioners] would suffer irreparable harm." *Id.* at A9.

Finally, the court observed that, "[e]ven if we could somehow ignore the jurisdictional requirements of § 437g(a)," petitioners "could not achieve the result [they] seek[]." Pet. App. A10. The court explained that it would have authority to order the Commission to take action only if the Commission's failure to act were contrary to law. "Since the FEC is given 120 days to act on a submitted complaint, § 437g(a)(8)(A), its delay in this case is neither unlawful nor unreasonable." *Id.* at A11.[2]

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[2] A suggestion for rehearing en banc was denied on October 15, 1996. See Pet. App. A34.

ARGUMENT

Petitioners seek review of the court of appeals' decision that the district court lacked jurisdiction to consider their claim before the expiration of the 120-day statutory period. Because the statutory period has now expired, and because the Presidential debates that petitioners sought to challenge have taken place, the question presented by the petition is now moot. Moreover, because the decision below would not otherwise warrant this Court's review, the petition should be denied.

1. Petitioners seek a ruling from this Court that the district court had jurisdiction to consider their claims before the expiration of the statutory period. See, *e.g.*, Pet. 13. Because that period expired on January 4, 1997, the 120-day restriction no longer precludes judicial review of petitioners' claim, and petitioners cannot benefit from the relief they seek here. The question presented by the petition is therefore moot. See, *e.g.*, *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) ("In general, a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (internal quotation marks omitted); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'") (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)); see also *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89-90 (1947) (federal court may not issue declaratory judgment if claim has become moot).

Petitioners contend (Pet. 15) that the question whether the district court had jurisdiction over their

claim is not moot because they plan to participate in the political process for elections in the year 2000. That contention miscomprehends this Court's mootness jurisprudence.

The Court has recognized a narrow exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review." See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976). As this Court has explained:

> [I]n the absence of a class action, the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements combine[]: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. *Bradford*, 423 U.S. 147, 149 (1975). Accord *Murphy* v. *Hunt*, 455 U.S. at 482.

This case does not meet the second element of that test; it is highly speculative whether petitioners will file an administrative complaint with the Commission with respect to debates for elections in the year 2000. Moreover, there is no "reasonable expectation" that, in the future, petitioners will file an administrative complaint so close to the date of scheduled debates that the Commission will lack adequate time in which to resolve the complaint.[3] To the contrary, it should

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[3] Unlike judicial proceedings, the administrative complaint procedure that is afforded by Section 437g(a)(1) has no standing requirement. Thus, petitioners need not wait to be excluded from a future debate before filing a complaint with the FEC. Here, the selection criteria that petitioners challenge

be presumed that petitioners will henceforth present any administrative complaint within a time period that will allow full and adequate consideration of their claims by the FEC and, if necessary, by the courts.[4]

As we demonstrate below, the court of appeals' decision in this case would not warrant the exercise of this Court's power of discretionary review in the absence of a suggestion of mootness. Because the Court would not otherwise grant review in this case, it is neither necessary nor appropriate for the Court to disturb the judgment of the court of appeals merely because the controversy has subsequently become moot. Accordingly, the petition should be denied. See *Dove* v. *United States*, 423 U.S. 325 (1976) (per curiam).[5]

---

were announced over a year before the date of the first Presidential debate. See Pet. App. A5.

[4] Nor is the 120-day period clearly "too short to be fully litigated prior to its cessation or expiration." *Weinstein* v. *Bradford*, 423 U.S. at 149. In seeking review by this Court, petitioners did not seek certiorari before judgment, see Sup. Ct. R. 11, or other emergency relief, nor did they file a petition for a writ of certiorari before the expiration of the 120-day period that was the basis for the decision below.

[5] Because the decision whether to grant review on any issue (including mootness) is discretionary with this Court, Sup. Ct. R. 10, we consistently have argued that the Court should deny review of cases that have become moot after the court of appeals entered its judgment but before this Court has acted on the petition, when such cases do not present any question that would independently be worthy of this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900) (arguing that Court should deny certiorari in moot cases that would not have warranted review on the merits); Robert L. Stern, Eugene Gressman, Stephen K. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* § 18.5, at 724 n.29 (7th ed. 1993)

2. The court of appeals' holding that the district court lacked jurisdiction to consider petitioners' claims before the expiration of the 120-day period is correct, and does not warrant further review. In *Cort* v. *Ash*, 422 U.S. 66 (1975), this Court held that a complainant seeking injunctive relief under the FECA must at least first exhaust administrative remedies before the Commission. *Id.* at 75-76 & n.9.[6] When Congress subsequently amended the FECA, in 1976, it confirmed that construction by specifying that the FEC's jurisdiction over civil enforcement is "exclusive," 2 U.S.C. 437c(b)(1), and it clarified that, except as provided in Section 437g(a)(8), the power of the Commission to initiate civil actions under Section 437g "shall be the exclusive civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. 437d(e). See also *Gabauer* v. *Woodcock*, 594 F.2d 662, 673 (8th Cir.) (en banc), cert. denied, 444 U.S. 841 (1979); *McNamara* v. *Johnston*, 522 F.2d 1157, 1161-1162 (7th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

(discussing *Velsicol* doctrine and stating that the Court appears to follow the argument advanced in the government's brief in that case); but see 13A Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 3533.10, at 432-435 (2d ed. 1984 & Supp. 1994) (disapproving *Velsicol* doctrine and stating that vacatur under *United States* v. *Munsingwear*, 340 U.S. 36 (1950), is always appropriate when case becomes moot before Court grants certiorari). Denial of certiorari is especially appropriate in this case, because the petition neither requests, nor suggests the possibility of, vacatur under *Munsingwear*. We have provided petitioner a copy of the United States' Brief in Opposition in *Velsicol*.

[6] The Court further held that no implied cause of action for damages exists under the FECA. *Cort* v. *Ash*, 422 U.S. at 77-85.

Congress created only one narrow exception to the Commission's "exclusive jurisdiction to determine how and when" to enforce the federal campaign finance statutes. *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 485-486 (1985). A private complainant may bring a civil action against the FEC only "[i]f the FEC dismissed [his or her] complaint or failed to act on it in 120 days." 470 U.S. at 488. If the district court then orders the FEC to pursue the complaint, the complainant may proceed in court directly against the respondent in the administrative proceeding "[i]f, and only if, the FEC fail[s] to obey such an order." *Ibid.*

As the court of appeals observed, it must be "assume[d] that in formulating [Section 437g's] procedures Congress * * * knew full well that complaints filed shortly before elections, or debates, might not be investigated and prosecuted until after the event." Pet. App. A10. Yet Congress included no exception for such circumstances in the text of the Act when it foreclosed judicial review until an administrative complaint is dismissed or the 120-day period has elapsed. In contrast, other provisions of the Act expressly shorten applicable time periods in anticipation of an approaching election. See 2 U.S.C. 437f(a)(2); 2 U.S.C. 437g(a)(4)(A)(ii); see also *United States* v. *Gonzales*, No. 95-1605, 1997 WL 85006, at *3 (Mar. 3, 1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Here, petitioners filed suit against the FEC and CPD just seven days into the 120-day statutory period, and before the FEC was able to take action on

their administrative complaint. Their suit therefore was precluded by the plain language of Sections 437d(e) and 437g(a)(8).

Petitioners suggest that the decision below conflicts with decisions of other courts of appeals that have recognized limited exceptions to the exhaustion doctrine. Pet. 10-11 (citing, *e.g.*, *Information Resources, Inc.* v. *United States*, 950 F.2d 1122 (5th Cir. 1992); *Venen* v. *United States*, 38 F.3d 100 (3d Cir. 1994)). Section 437g(a)(8), however, contains not only a jurisdictional requirement of exhaustion, but also an unequivocal restriction on federal court jurisdiction for a fixed period of time. See *FEC* v. *National Conservative Political Action Committee*, 470 U.S. at 488. Moreover, as the facts of this case illustrate, where neither of the conditions precedent to jurisdiction have occurred, a court is not in a position to "declare that the dismissal of the [administrative] complaint or the [Commission's] failure to act is contrary to law." 2 U.S.C. 437g(a)(8)(C). The cases cited by petitioners are therefore inapposite.[7]

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[7] In any event, the cases cited by petitioners recognize a narrow exception to certain statutory exhaustion requirements "when administrative remedies are inadequate." *Information Resources, Inc.* v. *United States*, 950 F.2d at 1126; see also *Venen* v. *United States*, 38 F.3d at 104. As we have explained, see note 3, *supra*, the FEC's inability in this case to dispose of petitioners' administrative complaint before the Presidential debates began resulted from the timing of petitioners' decision to file that complaint, not from any inadequacy inherent in the administrative mechanism.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1997

Supreme Court, U.S.
FILED
APR 11 1997
OFFICE OF THE CLERK

No. 96-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DR. JOHN HAGELIN, DR. MIKE TOMPKINS,
and the NATURAL LAW PARTY OF THE
UNITED STATES OF AMERICA,
Petitioners,

v.

FEDERAL ELECTION COMMISSION and
COMMISSION ON PRESIDENTIAL DEBATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT COMMISSION ON PRESIDENTIAL DEBATES' BRIEF IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

Whether a party, claiming exigent circumstances, may obtain judicial relief for an alleged violation of the Federal Election Campaign Act (the "Act") within just days of filing its complaint with the Federal Election Commission (the "FEC"):

(1) despite the Act's explicit mandate that the FEC shall have "exclusive jurisdiction" for civil enforcement of the Act and requirement that no court take any action in connection with such a complaint until a 120-day period has elapsed from the filing of the complaint with the FEC;

(2) where the claimed "exigent circumstances" were wholly avoidable had the party initiated its complaint with the FEC in a timely manner; and

(3) where the judicial relief the party seeks is both beyond the statutory authority granted in the enforcement provisions of the Act and, if granted, would infringe the First Amendment rights of another party.

RULE 29.6 LIST

Respondent Commission on Presidential Debates has no parent corporation or subsidiaries.

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RESPONDENT COMMISSION ON PRESIDENTIAL DEBATES' BRIEF IN OPPOSITION

Respondent Commission on Presidential Debates respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. The opinion is reported at 97 F.3d 553 (1996).

STATEMENT OF THE CASE

A. The Commission on Presidential Debates

The Commission on Presidential Debates ("CPD") was created on February 19, 1987, as a private, not-for-profit corporation, dedicated solely to the sponsorship of general election debates and related voter education functions.

CPD receives no funding from the government or any political party.[1]

The CPD Board is jointly chaired by Frank J. Fahrenkopf, Jr., former chairman of the Republican National Committee, and Paul G. Kirk, Jr., former chairman of the Democratic National Committee. Notwithstanding Petitioners' claims to the contrary, CPD is *not* controlled by the two major political parties nor has it been operated for the purpose of strengthening the major parties. While the CPD's creation was enthusiastically supported by the then-chairmen of the major parties, it was formed and has operated as a separate and independent corporation.[2]

CPD sponsored two presidential debates during the 1988 general election and four debates during the 1992 election. In connection with the 1996 general election campaign, CPD sponsored two presidential debates and one vice presidential debate. CPD's debates have been viewed by tens of millions of Americans, and have served a valuable voter-education function. In addition, CPD has undertaken a number of broad-based, nonpartisan

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[1] CPD was created in response to two studies independently conducted by the Georgetown University Center for Strategic and International Studies and the Harvard University Institute of Politics. Both the Georgetown and Harvard reports recommended that the two major political parties endorse a mechanism designed to ensure, to the greatest extent possible, that presidential debates between the leading candidates be made a permanent part of the electoral process.

[2] Before the CPD began its operations in earnest, there were, as Petitioners note, isolated references to the CPD as a "bipartisan" effort. In context, however, such references spoke only to the efforts of the CPD's founders to ensure that it was not controlled by any one political party, not an effort by the two major parties to control the CPD's operations or to exclude debate participation by nonmajor party candidates in CPD-sponsored debates. CPD and its independent Advisory Committee have gone to great lengths to research, establish and apply a scrupulously nonpartisan procedure for selecting debate participants.

voter education projects designed to enhance the educational value of the debates themselves.

The CPD's Candidate Selection Criteria for 1996 General Election Debate Participation, which were publicly announced on October 31, 1995, were carefully designed to further the educational mission of the CPD, which is:

> to ensure, for the benefit of the American electorate, that general election debates are held every four years between the leading candidates for the offices of President and Vice President of the United States.

(Exh. 1 of Exh. I to Memorandum of Points and Authorities in Support of the CPD's Motion to Dismiss, District Court Civ. A. No. 96-2132 ("CPD's Motion").)

The CPD's candidate selection criteria are the result of much careful consideration, including input by a committee comprised of electoral experts not associated with any political party. The criteria thoughtfully addressed participation in the debates by nonmajor party candidates, recognizing the fact that, in any given presidential election year, there are scores of declared nonmajor party presidential candidates, including over 130 in 1996.

> A Democratic or Republican nominee has been elected to the Presidency for more than a century. Such historical prominence and sustained voter interest warrants the extension of an invitation to the respective nominees of the two major parties to participate in the Commission's 1996 debates.
>
> In order to further the educational purposes of its debates, the Commission has developed nonpartisan criteria upon which it will base its decisions regarding selection of nonmajor party candidates to participate in its 1996 debates. The purpose of the criteria is to identify nonmajor party candidates, if any, who have a realistic (*i.e.*, more than theoretical) chance of being elected the next President of

> the United States and who properly are considered to be among the principal rivals for the Presidency. The realistic chance of being elected need not be overwhelming, but it must be more than theoretical.

Id. The criteria designed to foster this goal set forth a number of specific indicators to be considered by the CPD's Advisory Committee and the Board of Directors. In summary,

> [t]he criteria contemplate no quantitative threshold that triggers automatic inclusion in a Commission-sponsored debate. Rather, the Commission will employ a multifaceted analysis of potential electoral success, including a review of (1) evidence of national organization, (2) signs of national newsworthiness and competitiveness, and (3) indicators of national enthusiasm or concern, to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of its debates.

Id.

In 1996, an independent Advisory Committee to the CPD's Board of Directors met to apply the CPD's candidate selection criteria in light of the facts and circumstances presented by the then-current campaign. After applying the criteria to both major and nonmajor party candidates, the Advisory Committee unanimously concluded that only President Clinton and Senator Dole and their respective running mates qualified for participation in the CPD-sponsored debates.[3] The CPD Board unanimously accepted that recommendation. Subsequently, CPD-sponsored debates were held on October 6, 9 and 16, 1996.

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[3] Petitioners suggest that CPD would not seriously consider inviting a nonmajor party candidate to participate in its debates. Petition (hereafter "Pet.") 8. The facts belie this suggestion; Ross Perot was invited to participate, and did participate, in the CPD's 1992 debates.

B. The Federal Election Commission Debate Regulations

Pursuant to the Federal Election Campaign Act of 1971 ("FECA" or the "Act"), 2 U.S.C. §§ 431-455, the Federal Election Commission (the "Commission" or "FEC") has promulgated regulations regarding the use of corporate funds to sponsor debates.[4] In their lawsuit below, Petitioners alleged that CPD had violated the FEC's regulation set forth at 11 C.F.R. § 110.13(c) ("Section 110.13(c)"). Section 110.13(c) provides in pertinent part:

> (c) Criteria for candidate selection. For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

CPD's criteria meet the requirements of Section 110.13(c) in all respects, including its requirement that the selection criteria used by debate sponsors be "objective." Petitioners rely upon a cramped construction of the phrase "objective criteria" in order to pick and choose among CPD's indicators to produce an outcome they would like. Indeed, in order to advance their decidedly partisan agenda, they assert that the FEC's regulation,

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[4] The FEC does not directly regulate debate sponsors such as CPD; nor has the FEC, in any sense, designated CPD as "the debate sponsor," contrary to the Petitioners' suggestion. Pet. 5. Rather, the FEC, pursuant to the Act, regulates campaign contributions and election expenditures. The FEC has issued regulations enabling a defined class of organizations, including organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, to sponsor debates "without being deemed to have made prohibited corporate contributions to the candidates taking part in [the] debates." 60 Fed. Reg. 64,260, 64,261 (1995) (commenting on 11 C.F.R. § 110.13).

11 C.F.R. § 110.13(c), permits only criteria that may be wholly mechanically applied.[5]

The FEC's regulations simply are not the anti-debate straitjacket Petitioners maintain. The regulations do not define the phrase "objective criteria" at all, and certainly do not define the phrase as Petitioners would.[6] CPD's criteria are objective within the ordinary meaning of that term. *See, e.g., Webster's Third New International Dictionary* 1556 (1986) (objective means "independent of what is personal or private in our apprehension and feelings: of such nature that rational minds agree in holding it real or true or valid"). CPD's "realistic chance of being elected" standard, which bears an obvious and rational relationship to the educational purposes of the debates, comports with this standard.

CPD's criteria also comport with the purpose of the FEC regulation. Section 110.13(c) is expressly intended only to "avoid the real or apparent potential for a *quid pro quo* and to ensure the integrity and fairness of the process." 60 Fed. Reg. at 64,262. There is simply nothing in law or logic to suggest that otherwise proper criteria such as CPD's are invalid merely because they permit the exercise of some objective judgment pursuant to pre-established and published guidelines.[7]

---

[5] Thus, they have advocated the strained proposition that, of CPD's criteria, only Constitutional eligibility to hold the office of President of the United States, ballot access and eligibility for matching funds from the FEC are "objective." (Verified Complaint, District Court Civ. A. No. 96-2132, at 6.)

[6] Indeed, as briefed more fully in the proceedings below, Petitioners' construction of the regulation is wholly inconsistent with the "legislative history" of the regulation.

[7] In fact, Petitioners' construction of the regulation likely would render it unconstitutional under the First Amendment on the grounds that it would not be narrowly tailored to reduce corruption or the appearance of corruption. This is the only governmental interest that is sufficiently compelling to justify restrictions on the

Petitioners also incorrectly contend that the CPD violated FEC regulations by providing an automatic invitation to the nominees of the Republican and Democratic parties. Pet. 6. Contrary to Petitioners' assertion, the nominees of the two major parties were not "automatically" invited to debate. Rather, the CPD determined that, *as of the 1996 campaign,* the "historical prominence" of, and "sustained voter interest" in, the Republican and Democratic parties warranted an extension of invitations to the nominees of those parties.[8] (CPD's Motion, Exh. I, Exh. 1.)

The FEC presently has before it Petitioners' administrative complaint, which will provide the FEC an opportunity to address the parties' differing views with respect to the proper construction of the regulation.

C. The Jurisdictional Provisions Of The FECA

The narrow issue on which Petitioners seek certiorari concerns the nature of the FEC's exclusive jurisdiction over violations of the Act. The FECA provides that "[t]he [FEC] shall have exclusive jurisdiction with respect

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expression of participants in the political process. *See Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 296 (1981); *Buckley v. Valeo,* 424 U.S. 1, 14, 18 (1976). CPD as a private sponsor of debates, is, of course, a participant in the political process with important First Amendment rights of its own. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* —— U.S. ——, 115 S. Ct. 2338, 2348 (1995).

[8] Moreover, even if the CPD did extend invitations to the major party candidates based solely on their status as the party nominees, that would not—standing alone—violate 11 C.F.R. § 110.13(c). *See* 60 Fed. Reg. at 64,262 (in amending the regulations, the FEC made clear that it did not intend to prevent a staging organization from providing an automatic invitation to one or both of the major party candidates, but rather to prohibit "a staging organization [*from*] *bar*[*ring*] minor party candidates . . . from participating simply because they have not been nominated by a major party") (emphasis added).

to the civil enforcement of [the Act]." 2 U.S.C. § 437c (b)(1).

> Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section *shall be the exclusive civil remedy for the enforcement of the provisions of this Act.*

2 U.S.C. § 437d(e) (emphasis added). Pursuant to 2 U.S.C. § 437g(a)(8)(A),

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

As correctly recognized in the decision below, *Perot v. Federal Election Commission*, 97 F.3d 553 (D.C. Cir. 1996), the procedures set forth in section 437g(a) of the Act "must be followed before a court can intervene" in a dispute over the enforcement of the Act. Petitioners' Appendix (hereafter "Pet. App.") A10.

D. Petitioners' Lawsuit

1. *The District Court Ruling*

Despite the clear jurisdictional framework of the FECA, Petitioners filed a lawsuit in the district court challenging CPD's compliance with the Act less than ten days after filing their complaint with the FEC. Petitioners' lawsuit against the FEC and CPD, which sought preliminary injunctive relief, was consolidated for argument along with a similar action filed by Ross Perot and his running mate and campaign organization. After extensive briefing and a lengthy hearing on October 1, 1996, the Honorable Thomas F. Hogan of the United States District Court for the District of Columbia carefully considered all argu-

ments raised by the plaintiffs and rejected them. Judge Hogan issued a lengthy bench ruling denying plaintiffs' requests for a preliminary injunction and dismissing their lawsuits. *See* Pet. App. A16-A33. The district court held, *inter alia*, that the FECA vested exclusive jurisdiction in the FEC to investigate and remedy alleged violations of the Act and FEC regulations. *Id.* at A24. The district court also held that the remedy plaintiffs sought—including an order requiring CPD to change its criteria—would exceed the court's power, in addition to disrupting or preventing the scheduled debates. The court treated the defendants' motions to dismiss as motions for summary judgment and granted summary judgment for defendants as a matter of law.

2. *The Court of Appeals' Ruling*

The United States Court of Appeals for the District of Columbia Circuit granted plaintiffs expedited review. On October 4, 1996, after briefing and oral argument, the Court of Appeals affirmed the district court's dismissal of plaintiffs' claims. The court's written opinion declared that "Congress could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA," and found that "a court is not free to disregard that congressional judgment." Pet. App. A8, A10. Moreover, the court recognized that, "[e]ven if we could somehow ignore the jurisdictional requirements of § 437g(a), Dr. Hagelin could not achieve the result he seeks." *Id.* at A10 (citation omitted). Specifically, the court recognized that, even if the jurisdictional requirements of section 437g(a) could somehow be ignored, the court did not have the power to compel the FEC to enforce its regulations in the manner that Petitioners interpreted them. Rather, "[w]hen the FEC's failure to act is contrary to law, we have interpreted § 437g(a)(8)(C) to allow nothing more than an order requiring FEC action." *See* 97 F.3d at 559 (mistran-

scribed at Pet. App. A10-A11). In addition, the court acknowledged that an order preventing CPD "from staging the debates or from choosing debate participants" would run afoul of the First Amendment principles that protect against prior restraints and allow speakers to choose the content of their speech. Pet. App. A11 (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, —— U.S. ——, 115 S. Ct. 2338 (1995)).

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners' brief deals primarily with jurisdictional issues under the FECA. Respondent CPD intends the arguments raised herein to supplement those presented by the FEC with respect to the jurisdictional issues.

I. PETITIONERS' ARGUMENTS IN FAVOR OF GRANTING THE WRIT ARE BASED ON AN INTERPRETATION OF THE DECISION BELOW THAT CANNOT BE SUPPORTED BY THE RECORD

Petitioners argue that the Court of Appeals (1) incorrectly interpreted *McCarthy v. Madigan*, 503 U.S. 140 (1992), as "abolishing all exceptions to statutory exhaustion" in all cases, (Pet. 13), and (2) ignored established precedents, (*id.* at 9), in rejecting Petitioners' claims. Petitioners err.

In the Court of Appeals, Petitioners asserted that the court "may ignore [the FECA's] elaborate statutory requirements and force the FEC to act immediately because otherwise [Dr. Hagelin] would suffer irreparable harm." Pet. App. A9. When rejecting this claim, the Court of Appeals began its discussion by stating that its own decisions, not *Madigan*, required its rejection of Petitioners' claims:

> To [rule for plaintiffs], however, would place us in conflict with our own decision in *In re: Carter-Mondale Reelection Committee, Inc.*, 206 U.S. App. D.C. 133, 642 F.2d 538 (D.C. Cir. 1980). *Carter-Mondale* is, as the FEC argues, directly on point.

Pet. App. A9.

To be sure, the Court of Appeals did cite *Madigan*, but it did so in support of its view of its own prior *dicta* in *Carter-Mondale*. That *dicta* suggested that there "might be extraordinary circumstances allowing a party to 'hurdle the explicit time constraints of the [Federal Election Campaign] Act.'" *Id.* at A10 (quoting *Carter-Mondale*, 642 F.2d at 543). In its decision in the instant case, the Court of Appeals clarified that, absent a challenge to the Act's requirements as unconstitutional, which Petitioners did not advance, there could be no such avoidance of the Act's provisions. Pet. App. A10 (where "Congress specifically mandates, exhaustion is required") (quoting *Madigan*, 503 U.S. at 144).[9]

Thus, the Court primarily relied on its own prior decision in *Carter-Mondale* in deciding the case, and noted that its precedents were consistent with *Madigan*. Accordingly, the major premise of Petitioners' brief—that the Court of Appeals "disregarded precedent and incorrectly extended this Court's decision in *McCarthy v. Madigan*," (Pet. 9)—cannot be supported by the plain language of the decision below.

II. PETITIONERS' MANUFACTURED "CONFLICT" IS NOT SUPPORTED BY CASE LAW

Petitioners have attempted to create the appearance of a conflict between the decision below and other case law. However, Petitioners not only fail to point out a conflict

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[9] The Court of Appeals further recognized that, *with respect to the FECA*, Congress's grant of exclusive jurisdiction to the FEC "is as specific a mandate as one can imagine." Pet. App. A10.

between the Circuits, they fail even to cite a single case decided as they would have this Court rule. Petitioners primarily rely on *dicta* from *Carter-Mondale*, which, as noted, the Court of Appeals itself has now explained, and cases involving statutes other than, and distinguishable from, the FECA. Petitioners' strained attempt to present a conflict to this Court merely serves to emphasize that there are no conflicting decisions with respect to jurisdictional provisions of the FECA.

Petitioners have not cited a single case enforcing the Act in which a court waived the Act's very explicit jurisdictional requirements. In fact, no court has ever held that the FECA's prerequisites for a private right of action may be excused. Lower courts have consistently applied the FECA's exclusive jurisdiction requirement with full force. *See Carter-Mondale*, 642 F.2d at 543 (declining to hear case because matter was within exclusive jurisdiction of FEC); *In re Federal Election Campaign Act Litig.*, 474 F. Supp. 1051, 1053 (D.D.C. 1979) ("this Court lacks jurisdiction over [this] complaint" because the plaintiff did not allege compliance with statutory prerequisites). Indeed, this Court itself has recognized that FECA's prerequisites must be satisfied. *See Federal Election Comm'n v. National Conservative Pol. Action Comm.*, 470 U.S. 480, 488 (1985) ("If, *and only if*, the FEC failed to obey such an order [finding it acted contrary to law], could the [complainant] Democrats bring a civil action directly against the [respondent] PACs to remedy the violation charged in their complaint.") (emphasis added). There simply is no conflict among courts with respect to the application of FECA's jurisdictional requirements.

In a seeming attempt to manufacture some conflict between the Circuits, Petitioners cite a laundry list of cases involving *other statutes*. *See* Pet. App. A35-A37 (setting forth judicial interpretation of exhaustion requirements under a number of statutes, none of which

contains the clear Congressional mandate of exclusive jurisdiction found in the FECA). These cases involving different statutes, language and considerations are inapposite to Petitioners' attempt to enforce the FECA and related regulations.

III. THE PETITION SHOULD BE DENIED BOTH BECAUSE OF PETITIONERS' DELAY AND IN LIGHT OF INDEPENDENT BASES CITED BY THE COURT BELOW FOR DENYING THEIR REQUEST FOR RELIEF

Assuming, *arguendo,* that there ever can be an exception to the clear statutory requirements of the FECA under extraordinary circumstances, these Petitioners do not merit special treatment.

First, Petitioners' argument that their compliance with the Act's jurisdictional requirements would be "futile" is undermined by their inexcusable delay in seeking relief. Petitioners waited over six months after the announcement of CPD's 1996 candidate selection criteria before filing a complaint with the FEC alleging that the criteria were facially invalid. Petitioners cannot use their own delay in challenging CPD's candidate selection criteria before the FEC as an excuse to disregard statutorily mandated procedures. *See Durkin for U.S. Senate Comm. v. Federal Election Comm'n,* Fed. Election Camp. Fin. Guide (CCH) ¶ 9147, 51,112, 51,116 (D.N.H. 1980) (rejecting futility argument when plaintiff waited for months before initiating an FEC investigation).

Second, as the Court of Appeals correctly recognized, it could not simply order the FEC, in the first instance, to enforce its regulations in accordance with the interpretation urged by the Petitioners. "When the FEC's failure to act is contrary to law [the Act] allow[s] nothing more than an order requiring FEC action." 97 F.3d at 559 (mistranscribed at Pet. App. A10-A11). Given the Petitioners' delay in filing their legal proceedings and the then-

imminent debates, there was no possibility of the FEC being able to take even expedited action that would have afforded relief to Petitioners.

Third, relatedly, the Court of Appeals recognized that the only order that would provide meaningful relief to Petitioners would be constitutionally suspect. The court stated that:

> if this court were to enjoin the CPD from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the CPD's First Amendment rights. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (prior restraint); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* —— U.S. ——, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (speakers' choice of content).

Pet. App. A11.

Because of Petitioners' delay and these independent, meritorious grounds supporting the decision below, a grant of certiorari to review alleged defects in the holding is not warranted.[10]

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[10] Petitioners summarily state that the case is not moot because it should be deemed capable of repetition yet evading review. *See* Pet. 15. This proposition is not at all evident given the pending FEC proceedings. There is no cognizable reason to assume that the FEC will not have addressed the Petitioners' administrative complaints well before the next election. Thus, it is difficult to conceive that Petitioners could legitimately find themselves similarly situated in connection with the general election campaign in the year 2000.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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April 11, 1997